December 2011

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

December 2, 2011

SECRETARY OF LABOR,	:	Docket No. CENT 2010-754-M
MINE SAFETY AND HEALTH	:	A.C. No. 23-00759-218908
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-755-M
v.	:	A.C. No. 23-00759-218908-02
	:	
MELROSE QUARRY & ASPHALT, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 8, 2011, the Commission received from Melrose Quarry & Asphalt, LLC ("Melrose") two motions submitted by counsel seeking to reopen two penalty proceedings and relieve it from the orders of default entered against it.[1]

On March 15, 2011, Chief Judge Lesnick issued the Orders to Show Cause and Default Orders in response to Melrose's failure to answer the Secretary's September 16, 2010 Petitions for Assessment of Civil Penalty. In the orders, he ordered the operator to file its answers within 30 days or it would be in default.

Melrose asserts that the current management at the quarry is attempting to sort through and address three years of citations which were not handled by the previous management. Counsel for Melrose states it only received the Secretary's petitions for assessment of civil penalties after contacting the Office of the Solicitor in late May 2011, after the default occurred. Melrose further states that, in the future, citations will be dealt with in an efficient manner to avoid default or delinquency. The Secretary does not oppose the requests to reopen.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2010-754-M and CENT 2010-755-M, both captioned *Melrose Quarry & Asphalt, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's orders here have become final decisions of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Melrose's requests and the Secretary's responses, in the interests of justice, we hereby reopen the proceedings and vacate the Orders of Default. Accordingly, these cases are remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[2]

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

[2] Answers to the Secretary's petitions for assessment of civil penalties were attached to Melrose's motions to reopen, and are deemed to be filed.

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December 2, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-1017-M
v.	:	A.C. No. 09-01139-226149
	:	
JUNCTION CITY MINING COMPANY, L.L.C.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 16, 2011, the Commission received from Junction City Mining Company, LLC ("Junction") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 18, 2011, Chief Judge Lesnick issued an Order to Show Cause and Default Order in response to Junction's failure to answer the Secretary's August 24, 2010 Petition for Assessment of Civil Penalty. The judge ordered the operator to file its answer within 30 days or it would be in default.

Junction asserts that it did not receive the Order to Show Cause or any other correspondence before receiving a delinquency notice regarding this case. The Secretary does not oppose the motion to reopen.

Having reviewed Junction's request and the Secretary's response, in the interest of justice, we conclude that the Order of Default has not become a final order of the Commission because the Order to Show Cause was never received by Junction. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Junction shall file an Answer to the Show Cause Order within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 2, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-9-M
v.	:	A.C. No. 30-00083-196397
TILCON NEW YORK, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 2, 2011, the Commission received from Tilcon New York, Inc. ("Tilcon") a motion submitted by counsel seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 15, 2011, Chief Judge Lesnick issued an Order to Show Cause which by its terms became an Order of Default if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Tilcon's failure to answer the Secretary's February 18, 2010 Petition for Assessment of Civil Penalty.

Tilcon asserts that it filed a timely response to the Show Cause Order which included a typographical error in the case docket number. Tilcon further asserts that it reached a settlement with the Secretary regarding this case on July 7, 2011. The Secretary does not oppose the request to reopen.

Having reviewed Tilcon's request and the Secretary's response, in the interest of justice, we conclude that Tilcon was not in default under the terms of the Show Cause Order, as it timely complied with the order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 6, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. VA 2010-585-R VA 2011-251
MINING & PROPERTY SPECIALISTS	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY: Jordan, Chairman; Young and Nakamura, Commissioners

This contest and civil penalty proceeding involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Mining & Property Specialists ("MAPS") under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). Administrative Law Judge William B. Moran affirmed the violation of 30 C.F.R. §75.512[1], and assessed a civil penalty of one dollar. *Mining & Property Specialists*, 33 FMSHRC ___, slip op. at 4-5, Nos. VA 2010-585-R and VA 2011-251 (Oct. 28, 2011) ("Dec."). The Secretary of Labor had sought a penalty of $100 and petitioned the Commission for review of the judge's penalty determination.

[1] The standard at issue provides that:

> All electrical equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. *A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.*

30 C.F.R. § 75.512 (emphasis added).

For the following reasons, we grant the Secretary's petition for review of the penalty imposed, vacate the judge's decision, and remand this matter for further proceedings consistent with our decision.

I.

Factual and Procedural Background

The judge found that "there were no factual disputes in need of resolution."[2] *Id.* at 3. On August 12, 2010, MSHA Inspector Richard Whitt inspected Guest Mountain Mining Corporation's Derby Wilson Mine, an underground coal mine in Wise County, Virginia. PDR at 3. Inspector Whitt issued a citation pursuant to section 104(a) of the Mine Act to MAPS, a contractor at the mine, for failure to make available an electrical examination book for a personnel carrier. *Id*.; Dec. at 2. MAPS contested both the citation and the penalty.[3] PDR at 3.

The citation charged MAPS with "moderate" negligence for the violation, which was not deemed "significant and substantial." *Id.* At the hearing, MAPS conceded that the examination book was not at the mine site, but was maintained at its offices 9.1 miles away. *Id*.; Dec. at 3. MAPS asserted that the book was available for inspection because the offices were nearby and on the inspector's way home from the mine site, and the book could have been faxed to the mine site for inspection. Dec. at 3. In explaining why the book was not maintained at the mine site, MAPS cited concerns about conditions at the mine creating the potential for deterioration of the records. *Id*.

The Secretary responded that having the records offsite and delaying production created the potential for operators generally to alter records prior to inspection (though no allegation was made against MAPS). *Id.* The Secretary also questioned whether she would have jurisdiction to enter MAPS' offsite offices, which are not a "mine" under the Act, and noted that the miners at the mine would not have access to a book maintained offsite. *Id.*

The judge agreed with the Secretary's contention that a fair reading of the standard implicitly requires the records to be maintained at the mine, and that even if the language of the regulation itself did not direct this conclusion, the Secretary's position on the matter was reasonable and was thus entitled to deference. *Id*. at 3-4. In discussing the operator's contention that offsite records satisfied the requirements of the regulation, he noted the difficulty in

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[2] The judge did not request a transcript of the proceedings, after determining that the recording would be kept available, and that a transcript could be ordered indefinitely. Dec. at 2 n. 1. While this reflects an admirable resource-consciousness, it does complicate review by the Commission. However, the judge's decision notes the agreement of the parties with his characterization of the facts.

[3] MAPS appeared *pro se* at the hearing.

determining, in a principled way, whether offsite records might be close enough to be considered "available." *Id.* at 4.

In assessing the penalty, the judge stated that there was no allegation of unsafe equipment or that equipment had not been examined and tested as required by the standard. *Id*. He also noted the Secretary's finding that the violation was not "significant and substantial" and that she deemed the negligence to be moderate and the gravity "unlikely." *Id.* The judge then held:

> Upon consideration of each of the statutory penalty criteria, the Court has taken the above into account and has further considered that MAPS had a good faith, though erroneous, interpretation of the standard's requirements. For this first instance of this violation, and having taken into consideration MAPS [sic] earnest belief that it was in substantial compliance, the Court believes that a penalty of $1.00 (one dollar) is appropriate. However, on similar facts, future violations by MAPS would not warrant such a minimal penalty.

Id.

II.

Disposition

Section 110(i) of the Mine Act confers upon the Commission the authority to assess all civil penalties provided under the Act. 30 U.S.C. § 820(i). It further directs that the Commission, in setting penalties shall consider:

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Under this clear statutory language, the Commission alone is responsible for assessing penalties. *See Sellersburg Stone Co. v. FMSHRC,* 736 F.2d 1147, 1151-52 (7th Cir. 1984) ("[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . we find no basis upon which to conclude that [MSHA's Part 100 Penalty regulations] also govern the Commission."). However, while there is no presumption of validity given to the Secretary's proposed assessments, we have repeatedly held that substantial deviations from the Secretary's proposed assessments must be adequately explained using the section 110(i) criteria. *Cantera*

Green, 22 FMSHRC 616, 620-21 (May 2000) (citations omitted*)*. The judge need not make exhaustive findings but must provide an adequate explanation of how the findings contributed to his penalty assessments. *Id.* at 622. This is essential to the process of review. *See Hubb Corp.,* 22 FMSHRC 606, 612 (May 2000) (stating that findings on criteria need to assure Commission and any reviewing court that penalties are appropriate).

We are unable to determine from the judge's decision whether the reduction in penalty is supported by the application of the statutory criteria. While the Secretary asserts that we should simply affirm the penalty she originally proposed based on the judge's tacit acceptance of some of her characterizations of the criteria, PDR at 12-13, we decline to do so.

Instead, on remand the judge must address each of the statutory criteria.[4] The negligence criterion merits particular consideration. We cannot ascertain what level of negligence the judge ascribed to MAPS and how this affected his penalty determination. The decision points to a "good faith, though erroneous" view of the law as a basis for reducing the penalty. Dec. at 4. However, in her petition, the Secretary alleges that the inspector testified that on May 11 and June 11, 2010, he had spoken with MAPS employees at another mine about the requirement that inspection records for the personnel carriers at those mines needed to be maintained at the mine site. PDR at 8-9. Because we do not have a transcript of the proceedings, and because the judge does not discuss this issue in his decision, we are unable to determine the circumstances surrounding these conversations, or whether any contrary evidence was submitted. These conversations could be relevant to the issue of whether MAPS had notice of MSHA's position regarding maintenance of inspection records offsite, which could affect the level of negligence. On remand, the judge must address this contention.

[4] Commissioner Young notes that the judge's decision does not discuss at all the operator's efforts to act promptly and in good faith to abate the violation, despite the Act's requirement that he do so. *See* 30 U.S.C. § 820(i) ("[T]he Commission *shall consider* . . . the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.") (emphasis added). In this case, the operator offered to have the inspection records faxed to the inspector from its office. Dec. at 3. Assuming that MSHA may properly require the records to be maintained at the mine site, as the Secretary contends, "availability" by facsimile transmission would not comply with the standard, but the offer to make them immediately available in this manner might serve as virtually instantaneous abatement. The judge must therefore take the abatement factor into account in reassessing the penalty.

III.

Conclusion

Our precedents require that the judge explain how his application of the statutory penalty criteria to the facts in each case supports his penalty determination. For the reasons set forth above, we vacate the penalty imposed by the judge and remand this matter for further proceedings consistent with our decision.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Commissioners Duffy and Cohen, dissenting:

We would affirm the judge's determination that the penalty should be reduced by $99 as well within the discretion accorded him under Commission case law. We agree with the majority that a judge is required to sufficiently explain his reasoning when assessing a penalty that substantially diverges from that proposed by the Secretary. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd,* 736 F.2d 1147 (4th Cir. 1984). Here, the judge's departure from the Secretary's proposed penalty was clearly occasioned by the judge's conclusion regarding the operator's negligence, which itself is supported by substantial evidence, and his giving greater weight to that penalty factor, which Commission case law plainly permits him to do. *See Spartan Mining Co.*, 30 FMSHRC 699, 724, 725 (Aug. 2008) (upholding judge's increase of Secretary's proposed penalty of $3,700 to $30,000 because judge explained his disagreement with Secretary's conclusions as to gravity and negligence and gave those factors increased weight).

The judge based his negligence analysis on the fact that the operator had a good faith belief that offering to have the records at issue faxed from the operator's central office to the mine site made those documents "available" for purposes of the regulation. We find that factor to be dispositive of the issue as to whether a penalty reduction from the level proposed by the Secretary was justified. Indeed, it is clear that the judge provided a sufficient basis for finding little or no negligence in light of the operator's contention that the records in question were electronically "available" in conformance with the intent of the standard.

In any event, we see no value to prolonging this matter when we are satisfied that a justifiable exercise of judicial discretion exists on the facts and the law.

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

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December 12, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-1334-M
	:	A.C. No. 35-03510-237487
	:	
	:	Docket No. WEST 2011-1335-M
v.	:	A.C. No. 35-03510-248691
	:	
	:	Docket No. WEST 2011-1425-M
	:	A.C. No. 35-03510-190325
	:	
HOOVER EXCAVATING, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 9, 2011, and August 31, 2011, the Commission received from Hoover Excavating, Inc. ("Hoover") three motions made by counsel seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2011-1334-M, WEST 2011-1335-M and WEST 2011-1425-M, all captioned *Hoover Excavating, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

The record indicates that proposed assessment No. 000237487 became a final order of the Commission on December 16, 2010. A notice of delinquency was mailed on February 10, 2011. Proposed assessment No. 000248691 became a final order of the Commission on April 14, 2011. A notice of delinquency was mailed on May 31, 2011. Both motions to reopen were filed on August 3, 2011.

Proposed assessment No. 000190325 was delivered on July 14, 2009, signed for by R. Hoover, and became a final order of the Commission on August 13, 2009. A notice of delinquency was mailed on September 30, 2009, and the case was referred to the U.S. Department of Treasury for collection on January 21, 2010. The motion to reopen was filed on August 29, 2011.

In all three cases, Hoover asserts that its owner was away from the office and relied on his assistants to file the paperwork correctly. Hoover further states that its owner was unable to confirm that the contests were filed in a timely manner.

The Secretary opposes the requests to reopen and notes that the operator makes no showing of exceptional circumstances that warrant reopening. The absence of any internal procedure to confirm that the required paperwork was filed does not constitute an adequate excuse. Moreover, the Secretary notes the operator's failure to explain why it waited approximately two months to two years after it was notified of its delinquency to request reopening.

In its reply to the Secretary's opposition, Hoover states that it was under the reasonable belief that the citations were properly contested. In his affidavit, Hoover's owner further claims that he was never notified that the contests were untimely, until a contractor informed him of his delinquent citations.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we conclude that the failure to follow up on the proposed assessments to see that they were properly processed and timely contested represents an inadequate or unreliable internal processing system, as the Secretary has alleged.[2] *Sloss Industries, Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007); *Gibbs v. Air Canada*, 810 F.2d 1529, 1537 (11th Cir. 1987). We also note that this type of failure appears to be part of a pattern for Hoover, as shown by the fact that the same failure occurred three times in the past two years.

Moreover, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See*, e.g., *Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC at 1316-17 (holding that motions to reopen filed more than 30 days after receipt of notice of delinquency must explain the reasons why the operator waited to file a reopening request, and lack of explanation is grounds for the Commission to deny the motion). Here, the unexplained delay in responding to MSHA's delinquency notice amounted to six months in proposed assessment No. 000237487. The operator also waited two months in proposed assessment No. 000248691 before seeking relief. Hoover has not provided an explanation for filing its motions to reopen more than 30 days after receiving the delinquency notices.

Finally, we have also held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons of mistake, inadvertence, or excusable neglect under subsections (1), (2), and (3) of the rule, not more than one year after the judgment, order, or proceeding was entered or taken. The motion to reopen in the case of proposed assessment No. 000190325 was filed more than a year after it became a final order. Therefore, with regard to proposed assessment No. 000190325, Hoover's motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004).

[2] We have considered the operator's contention that since one citation in assessment No. 000248691 was in "contest mode" then the citation at issue here must have been timely contested. We find this argument unavailing.

Having reviewed Hoover's requests and the Secretary's responses, we conclude that Hoover has failed to establish good cause for reopening the proposed penalty assessments and deny its motions with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 16, 2011

SECRETARY OF LABOR,	:	Docket No. KENT 2010-416
MINE SAFETY AND HEALTH	:	A.C. No. 15-19310-205377
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-417
v.	:	A.C. No. 15-19310-205377
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	:	
FRASURE CREEK MINING, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 12, 2011, the Commission received from Frasure Creek Mining, LLC ("Frasure") motions made by counsel seeking to reopen two penalty assessment proceedings and relieve it from the orders of default entered against it.[1]

On March 15, 2011, Chief Judge Lesnick issued two Orders to Show Cause and Orders of Default in response to Frasure's failure to answer the Secretary's January 25, 2010 Petitions for Assessment of Civil Penalty. The judge ordered the operator to file its answers within 30 days or it would be in default.

Frasure asserts that it did not receive the Orders to Show Cause or the Secretary's previously filed Petitions for Assessment of Civil Penalty because they were apparently sent to Frasure's corporate office. Frasure had asked MSHA to serve the petitions on its counsel, and counsel had entered an appearance in a related contest proceeding before the Commission. Frasure further asserts that it was not aware the petitions were filed until it received the delinquency notice dated July 29, 2011. The Secretary does not oppose the motions to reopen.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2010-416 and KENT 2010-417, both captioned *Frasure Creek Mining, LLC*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

We conclude that relief under Rule 60(b) is warranted in these cases because the Orders to Show Cause were inadvertently sent to Frasure's corporate office, instead of to its counsel as it had anticipated. Consequently, having reviewed Frasure's request and the Secretary's response, in the interest of justice, we hereby reopen these proceedings and vacate the Orders of Default. Accordingly, these cases are remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Frasure shall file an Answer to the Show Cause Orders within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 16, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of CINDY L. CLAPP	:	Docket No. WEST 2010-1773-D
v.	:	
CORDERO MINING, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER GRANTING MOTION FOR STAY IN PART

BY: Jordan, Chairman; Duffy, Young, and Nakamura, Commissioners

This proceeding involves a complaint of discrimination filed by the Secretary of Labor on behalf of Cindy L. Clapp under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), against Cordero Mining, LLC ("Cordero"). *See* 30 U.S.C. § 815(c). On May 4, 2010, Clapp filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that Cordero had terminated her employment in retaliation for Clapp's exercise of her rights under section 105(c). After MSHA's initial investigation of Cordero's complaint, the Secretary filed an Application for Temporary Reinstatement pursuant to section 105(c)(2) of the Act on behalf of Cordero in Commission Docket No. WEST 2010-1314-D.

On June 24, 2010, prior to a hearing on the application, the parties filed a Joint Motion to Approve Settlement which requested that Clapp be immediately economically reinstated under the same terms of employment as if her employment had not been terminated on March 18, 2010. Docket No. WEST 2010-1314-D, Unpublished Order at 1 (June 28, 2010) (ALJ). The judge soon thereafter ordered economic reinstatement per the terms of the settlement. *Id.* at 2. In the motion, the parties stated that they agreed that "Clapp's temporary reinstatement shall expire only after any Decision or other similar order from the Federal Mine Safety and Health Review Commission becomes a final order that is not appealed by the Secretary of Labor or Respondent." Joint Mot. to Approve Settlement at 4.

After a further investigation into the merits of Cordero's discrimination complaint, on September 7, 2010, the Secretary filed a complaint in the instant proceeding requesting that the judge conclude that Clapp had been unlawfully discharged. The Secretary sought reinstatement for Clapp to her former position, lost wages from March 18, 2010, for the miner, expungement of the circumstances involving Clapp's discharge from her personnel file, and the assessment of a $20,000 civil penalty against Cordero, as well as other remedial measures designed to address Cordero's violation of the Act.

A hearing was held and on December 5, 2011, the judge issued a decision. He concluded that Cordero violated section 105(c) "by discriminating against and discharging Cindy Clapp and otherwise interfering with her safety-complaint rights under the Act." Docket No. West 2010-1773-D, Slip op. at 64 (Dec. 5, 2011) (ALJ). The judge ordered Cordero to take "affirmative action necessary to effectuate the policies of the Mine Act" within 14 days from the date of his order. *Id.* at 65. Included was the requirement to offer Clapp full reinstatement to her former position, to make Clapp whole for her lost earnings, to remove from the mine's files references to the unlawful discharge, to post a copy of the judge's decision, and to pay a civil penalty of $40,000. *Id.*

On December 12, 2011, Cordero filed a motion to stay enforcement of the judge's December 5 decision. Cordero contends that the judge's decision essentially divests the operator of its right under section 113(d)(2)(A)(i) of the Mine Act to appeal the judge's decision within 30 days and before it becomes a final order of the Commission. *See* 30 U.S.C. § 823(d)(2)(A)(i). The operator also asserts that the judge's decision violates the terms of his earlier temporary reinstatement order because it, in effect, dissolves that order before the entry of a final order by the Commission in this proceeding. Cordero requests that the stay extend 14 days beyond the Commission's final determination in this matter, and that the Commission order the existing economic reinstatement to continue until that date.

The Secretary does not oppose the motion for stay. On December 16, 2011, in response to the Commission's request, Ms. Clapp submitted her views. While her statement did not directly address Cordero's motion, she did inform the Commission that she felt that the operator "has had more than enough time to deal with this matter."

Having considered the parties' submissions and the terms of the Mine Act, we hereby grant the motion in part and stay enforcement of the judge's December 5 decision as follows. In the event that Cordero does *not* file a Petition for Discretionary Review ("PDR") of the judge's decision, the actions that the judge's decision requires Cordero to take shall be taken by the operator no later than 17 days after the dates the judge specified in his decision. In the event that Cordero files a PDR, the stay of enforcement of the judge's decision will automatically extend an additional 10 days while the Commission considers Cordero's petition. In order to obtain a stay any longer than that, Cordero's PDR must be accompanied by an application for stay pending appeal to the Commission.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Commissioner Cohen, dissenting:

I respectfully dissent from my colleagues' granting of a stay to Cordero Mining, LLC.

On December 5, 2011 Judge Thomas P. McCarthy issued a 66-page Decision and Order involving a complaint of discrimination under section 105(c) of the Mine Act. 30 U.S.C. § 815(c). The complainant, Cindy Clapp, is a shovel operator with 28 years of experience as a miner. Judge McCarthy noted that Ms. Clapp's "co-workers and managers consistently lauded her as a very safe and productive shovel operator, who set the standard." Slip op. at 4. The judge found that after Cordero brought in new supervisors for Ms. Clapp's crew, between February 2009 and March 2010, Ms. Clapp repeatedly made complaints about safety to Cordero, and was met by refusals and anger on the part of her supervisors. These confrontations about unsafe working conditions escalated in March 2010 and, according to the judge, included Cordero's intimidation of Ms. Clapp and another miner who joined with her in making safety complaints. On March 18, 2011 Cordero terminated Ms. Clapp's employment because of alleged insubordination. According to Judge McCarthy, Cordero also retaliated against the miner who had joined Ms. Clapp in making safety complaints.

Judge McCarthy concluded that Ms. Clapp had engaged in protected activity under the Mine Act, that Cordero took adverse action against her after 28 years of service, and that the adverse action was motivated by retaliatory animus against Ms. Clapp's safety complaints. The judge further concluded that the reason proffered by Cordero for firing Ms. Clapp – her alleged insubordination – was a pretext.

Having concluded that Cordero violated the Mine Act in firing Ms. Clapp, Judge McCarthy ordered Cordero to cease and desist from discharging or otherwise discriminating against Ms. Clapp or any other miner because they have engaged in protected activity, and from interfering with miners in the exercise of rights guaranteed them by section 105(c)(1) of the Mine Act. The judge also ordered that within 14 days of the Order, Cordero must take affirmative action including the reinstatement of Ms. Clapp to her former job with back pay, the removal from its files of any reference to the unlawful discharge of Ms. Clapp, the payment of a civil penalty to the Secretary of Labor in the amount of $40,000 (double what the Secretary had proposed), and the posting of the judge's Decision and Order for 60 consecutive days in conspicuous places including all places where notices to miners are customarily posted. In making this Order, Judge McCarthy stated that he was "troubled by the chilling effect that Clapp's discharge has had on other miners' willingness to step forward and engage in protected activity under the Act." Slip. op. at 64. In this context the judge noted that one subpoenaed witness testified that she was "terrified" to testify against Cordero because of fear of retaliation, Slip. op. at 63 n.52, and that two other subpoenaed witnesses "broke down in tears on the witness stand for fear of Respondent's retaliation against them." Slip. op. at 64.

On December 12, 2011 Cordero filed a motion to stay enforcement of Judge McCarthy's Order.

The Commission recognizes that a stay constitutes "extraordinary relief" and requires the party seeking the stay to satisfy the following factors: (1) likelihood of prevailing on the merits of the appeal; (2) irreparable harm if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *Stillwater Mining Co.* , 18 FMSHRC 1756, 1757 (Oct. 1996). Cordero's motion for a stay makes no assertion that it will prevail on appeal, no assertion of irreparable harm, and no assertion that a stay is in the public interest. In the absence of assertions which the Commission requires, the stay should be denied.

Cordero's motion to stay does make the claim that "The Requested Stay Will Not Harm Complainant," arguing that the economic reinstatement order will still be in effect. Mot. at 5. However, Ms. Clapp, in her statement to the Commission regarding the stay, recounts in detail the devastating effect of the firing on her and her family for two years, and states that "Cordero has had more than enough time to deal with this matter." Statement at 2. Ms. Clapp also states:

> I have been terminated for nearly two years and the co-workers that came forward hoping to make a difference in the workplace for safety feel that we can't make a difference, that nothing has changed at work and that it is over and that we aren't protected.

Id. at 1. This is a remarkable statement of the futility felt by the Cordero miners in their attempts to vindicate rights guaranteed to them by the Mine Act. Moreover, Ms. Clapp's statement is entirely consistent with Judge McCarthy's findings and conclusions.

It is clear to me that there is no basis for delaying the provisions of the judge's order which require that Ms. Clapp's personnel file be purged of references to her unlawful discharge, and that the judge's Decision and Order be posted in conspicuous places including all places where notices to miners are customarily posted. With regard to the former provision, the judge noted in his Decision that Ms. Clapp has encountered difficulty finding other work since her firing because of what is contained in her personnel file at Cordero. Slip op. at 59, 64. With regard to the latter provision, the findings by Judge McCarthy about Cordero's intimidation of, and retaliation against, its miners for voicing safety concerns, together with Ms. Clapp's statement to the Commission regarding her co-workers' feelings about their inability to make a difference in the workplace for safety compel the conclusion that the posting of Judge McCarthy's Decision and Order should not be stayed.[1]

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[1] In its motion for stay, Cordero states that Judge McCarthy made "significant demands" upon it:

> Hypothetically, and without presupposing a particular outcome, what would happen if the Review Commission decided to take the case on discretionary review and subsequently reversed ALJ McCarthy's decision? At that point, the entire "bell" would need

(continued...)

Nor has Cordero shown a basis for staying the provisions of the Order which require Cordero to reinstate Ms. Clapp to her job at the mine. The granting of a stay on reinstatement presupposes that the economic reinstatement which Ms. Clapp has received pending the issuance of the judge's Decision and Order is the equivalent of having her job back, with the right and opportunity to work for her paycheck. However, it must be recognized that Ms. Clapp has been receiving economic reinstatement because the Secretary sought temporary reinstatement pursuant to section 105(c)(2) of the Mine Act. The parties then settled this issue by filing a Joint Motion to Approve Settlement providing for economic reinstatement – Ms. Clapp would receive her pay and benefits but would not report to work. Obviously, Cordero made the decision to enter into this settlement – and thus pay Ms. Clapp for not working – because it did not want her at the mine. Pursuant to Judge McCarthy's Decision and Order, Ms. Clapp is now entitled to full reinstatement, not merely temporary reinstatement or economic reinstatement.

The nub of Cordero's motion to stay is the argument that the order with its 14-day provisions is invalid because section 105(c)(2) of the Mine Act provides that:

> The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance.

30 U.S.C. § 815(c)(2). Cordero also cites section 113(d)(1) of the Mine Act which states: "The decision of the administrative law judge . . . shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed . . ." 30 U.S.C. § 823(d)(1). Thus, as noted by my colleagues,

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[1](...continued)

> to be "unrung." Complainant, after being back at the mine for a time, would need to be terminated again; she and MSHA would need to return the funds paid by Respondent, and a conflicting Decision and Order would need to be posted at the mine. It would be less disruptive to all parties to continue with the status quo until there is a final determination in this matter.

Mot. at 6 (emphasis in original). Thus, Cordero seeks to have Judge McCarthy's Order stayed until the entire appellate process is completed. Leaving aside the chutzpah of Cordero's purporting to speak of the "disruption" to "all parties" (including Ms. Clapp), it is clear that whatever may be necessary to "unring" the "bell" pales in comparison to the ongoing "disruption" and damage – at least according to Judge McCarthy's Decision and Order, which as yet stands unchallenged – caused by Cordero's pattern of discriminatory actions toward Ms. Clapp and her fellow miners.

Cordero contends that the judge's Decision and Order essentially divests it of its right to appeal the decision within 30 days and before it becomes a final order of the Commission.

I reject the contention that the judge's Order, with its provision for affirmative action within 14 days, is inconsistent with the terms of the Mine Act. It certainly does not divest Cordero of its right to appeal the decision.[2] The provisions of finality in sections 105(c)(2) and 113(d)(1) should be interpreted to mean that the judge's order goes into effect, but is not enforceable during the period provided for appeal – in other words, no sanctions can be imposed during the appeal period for disobedience of the order. But the lack of finality does not mean that the order is necessarily ineffective, or that a party must necessarily be excused from obeying it. Rather, reading the judge's order together with the terms of the Mine Act results in a situation where, if Cordero chooses to disobey the order, no sanctions can be imposed against it until the order becomes final. Obviously, if the Decision and Order should be vacated by the Commission or a Court of Appeals, there can be no sanctions for disobeying it. However, if Cordero chooses to disobey the order after 14 days of its issuance, sanctions can be imposed for such disobedience if and when the order becomes final. The choice is Cordero's.

Hence, I dissent from the granting of the stay.

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

[2] It is well established that a party may comply with a court order and still retain the right to appeal the order, without its compliance rendering its appeal moot. *See, e.g., Mancusi v. Stubbs,* 408 U.S. 204, 206 (1972), and cases cited therein.

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December 16, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2010-1856-RM
LAKEVIEW ROCK PRODUCTS, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), and involves a citation alleging that Lakeview Rock Products, Inc. ("Lakeview"), violated 30 C.F.R. § 56.9300.[1] Following the submission of cross motions for summary decision on stipulated facts,[2] Administrative Law Judge Kenneth Andrews granted Lakeview's motion and vacated the citation. 31 FMSHRC __, slip op. at 10, No. WEST 2010-1856-RM (June 22, 2011) (ALJ). The Commission thereafter granted the Secretary of

[1] 30 C.F.R. § 56.9300 provides in relevant part:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
>
> (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

[2] The parties submitted a Joint Statement of Undisputed Material Facts, which the judge set forth in his decision. *See* 31 FMSHRC at ___, slip op. at 2-4, No. WEST 2010-1856-RM (June 22, 2011) (ALJ).

Labor's ("the Secretary") petition for discretionary review ("PDR"). For the reasons that follow, we vacate the judge's decision and remand this proceeding to the judge.

I.

Factual and Procedural Background

The Secretary and Lakeview stipulated through their counsel to the following undisputed material facts: On September 8, 2010, MSHA inspector Mike Tromble ("Inspector") issued to Lakeview Citation No. 6580393, alleging that three pairs of scales that are located at the mine did not comply with 30 C.F.R. § 56.9300(b). Jt. Ex. 1. All six of Lakeview's scales are elevated to a height of 31 to 54 inches above ground level, in order for Lakeview employees to perform annual maintenance and calibration work on each of the scales. All the scales have eight-inch high steel "rub rails" running the length of the scale. The wheelbases of the trucks that use the scales range from 22 feet 8 inches to 61 feet 2 inches. The mid-axle height of these trucks range from 20 inches to 24 inches. Their loaded weights vary from 19,000 pounds empty to 80,000 pounds loaded. Between 15 and 100 trucks use the scales daily.

The parties filed cross-motions for summary decision below. In his decision, the judge determined that MSHA's slide presentation on truck scales is entitled to little, if any, probative value in the instant determination, since it did not consider the effect of eight-inch rub rails. Slip op. at 7-8. While accepting the guidance of the prior ALJ decisions that scales are a part of a mine's roadways, the judge opined that those decisions are distinguishable from the instant case because each of the prior decisions involved scales with no berms, guardrails or guarding of any kind. *Id.* at 8. The judge went on to conclude that the Secretary failed to establish how and/or under what circumstances a truck's front tire would be able to drive up onto and over or through the eight-inch high rub rail installed on the scales. *Id.* at 9. Therefore, the judge concluded that the Secretary had not carried her burden of proof and failed to establish by a preponderance of the evidence that Lakeview's scales pose a danger of a vehicle overturning or endangering persons in equipment. *Id.* at 9-10. The judge denied the Secretary's Motion for Summary Decision, granted Lakeview's Motion for Summary Decision, and vacated Citation No. 6580393. *Id.* at 10.

II.

Disposition

In her PDR, the Secretary argues that the judge erred in determining that elevated truck scales provided with eight-inch high rub rails are not subject to 30 C.F.R. § 56.9300(b)'s requirement that berms or guardrails at mid-axle height be provided where there is a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in the vehicle. She contends that her Program Policy Letter P10-IV-1 ("PPL") clearly states that rub rails on elevated truck scales are not a substitute for mandated guardrails. The Secretary maintains that

the adequacy of guarding against overturning and injury is properly evaluated only after it is first determined that a drop-off of sufficient grade or height may pose a danger of injury to miners. The Secretary asserts that she has established in her motion for summary decision that the Lakeview truck scales have a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. In support of her position, the Secretary provided the declaration of Terence M. Taylor, a Senior Civil Engineer with MSHA's Directorate of Technical Support, who performed an engineering analysis using the particular facts in this case and concluded that a truck would likely overturn, or its axle and undercarriage would crash down upon the decking, if it traveled over the edge of the scales, and that this would likely endanger the truck's occupants. S. Ex. 3. Moreover, the Secretary states that Lakeview's position was not that a truck traveling off the edge of the scale would not overturn or result in injury to the truck's occupants, but that the rub rails were in effect an adequate substitute for the guardrails required by the standard because they rendered such an occurrence unlikely. Therefore, the Secretary maintains that the evidence presented by her was essentially uncontested, and if it were disputed, summary decision would have been improper.

In its Memorandum in Opposition to the Secretary's Motion for Summary Decision, Lakeview asserted that the Secretary failed to meet her burden of proof by a preponderance of evidence that a drop-off exists of sufficient grade or depth to cause a vehicle to overturn. Lakeview argued that the Secretary lacked any expert biomechanical analysis showing the potential effects on the occupants of trucks driving off the scales. Moreover, Lakeview purported there was no evidence that the existing rub rails will not prevent all trucks traveling slowly over the scales from driving off of them. Finally, Lakeview questioned the expertise and experience of the Secretary's engineers, stating that they were not fully qualified to testify about biomechanics and injuries to individuals, or the adequacy of the rub rails on Lakeview's scales.

Summary decisions are governed by Commission Procedural Rule 67, which provides that:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and
>
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that[] '[s]ummary decision is an extraordinary procedure,'" and has analogized it to Rule 56 of the Federal Rules of Civil Procedure, under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy*

West Mining Co., 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).[3]

In addition, appellate review of summary judgment decisions issued pursuant to Federal Rule 56 is *de novo*, in that the reviewing court applies the same Rule 56(c) standard as the trial court. 10A Charles Alan Wright, et al., *Federal Practice and Procedure* § 2716, at 273-74 (3d ed. 1998). Moreover, the Supreme Court has stated that "[w]e look at the record on summary judgment in the light most favorable to . . . the party opposing the motion," and that "the inferences to be drawn from the underlying facts contained in [the] materials [supporting the motion] must be viewed in the light most favorable to the party opposing the motion." *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Consequently, the Commission has held that when it reviews a summary decision and determines that the record before the judge contained disputed material facts, the proper course is to vacate the grant of summary decision and remand the matter for an evidentiary hearing. *See Energy West Mining Co.*, 17 FMSHRC 1313, 1316-19 (Aug. 1995); *Missouri Gravel*, 3 FMSHRC at 2473.

Section 56.9300 provides in relevant part:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
>
> (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

30 C.F.R. § 56.9300. The requirements of section 56.9300, applied to the facts of this case, can be broken down into three elements: (1) whether the scales are part of a roadway; (2) whether each scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment; (3) whether the scales are equipped with berms or guardrails that are at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

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[3] Rule 56(a) provides for the filing of motions for summary judgment and states that:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(a).

In its Memorandum in Opposition to Respondent's Motion for Summary Decision, Lakeview conceded the first element of section 56.9300 – that the scales are part of a roadway – and conceded that its rails are not at least mid-axle height, as required under the third element of section 56.9300. Pet. Memo. in Opp. at 2.[4] Moreover, the judge accepted the findings, made by other administrative law judges in prior decisions, that scales are part of a mine's roadways. Slip op. at 8. In their Joint Statement of Undisputed Material Facts, the parties stipulated that the mid-axle height of the trucks using Lakeview's scales range from 20 to 24 inches, and that all of Lakeview's scales have eight-inch high steel "rub rails." *Id.* at 3-4. Therefore, the judge's decision should have properly turned on element (2), namely, whether each scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. However, the judge failed to make this determination and instead concluded that the presence of the rub rails prevented a vehicle from overturning and harming it or its occupants.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

We conclude that the judge erred by failing to interpret the regulatory language according to its plain meaning. By the standard's plain terms, the judge must first decide whether "a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." Only if this element is established may the judge then consider any existing berms or guardrails. Here, the judge erred by considering the presence of the rub rails before deciding whether the scales' drop-off fits within the scope of the safety standard. In fact, despite the Secretary's proffered evidence, the judge never determined whether each scale has a drop-off of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

While the operator challenged the expertise of the Secretary's engineers, the judge must address whether the operator disputed the Secretary's evidence that a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.[5] If the record before the judge contains an unresolved dispute concerning whether a drop-off ranging from 31.5 to 54 inches is of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment, the proper course is to proceed to an evidentiary hearing, allowing both sides to submit additional evidence on element (2) of section 56.9300. If, on the other hand, the

[4] With regard to our colleague's dissenting opinion, since the parties concede this issue and neither party raised it on review, we think it is not appropriate to address the issue of whether the scales are part of a roadway.

[5] We note that in his decision, the judge stated: "The conclusion of the engineering study that a vehicle might overturn depending on the depth of drop-off may be correct, and this does stand uncontroverted by any expert opinion submitted by Lakeview." Slip op. at 9.

operator never directly contested the Secretary's assertion that the drop-off was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment, the judge should deny Lakeview's Motion for Summary Decision and grant the Secretary's Motion for Summary Decision.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision granting Lakeview's Motion for Summary Decision and remand this case for a determination, in accordance with this decision, of whether the record contains an unresolved dispute of material fact.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Commissioner Duffy, dissenting:

I would affirm the judge's decision in result and vacate the citation on the grounds that 30 C.F.R. § 56.9300 does not apply to the three pairs of scales cited by the inspector for lack of berms or guardrails. My colleagues, the judge, the Secretary, and – at least for purposes of the cross motions for summary decision below – the operator, have proceeded from the premise that the scales in question are part of the roadways at the subject mine, citing MSHA's Program Policy Letter P10-IV-1 and several unreviewed decisions by Commission administrative law judges as authority. I fundamentally reject that premise.

"Roadway" is not defined in 30 C.F.R. Part 56, but it is generally defined as "a road, especially the part vehicles travel over." American Heritage College Dictionary 1201 (4th ed. 2002). In my view, the plain meaning of the term "roadway" does not encompass the scales at issue here. The entire context of 30 C.F.R. § 56.9300 contemplates travelways or haulage routes – in a word, "roads." It does not extend to adjunctive facilities, such as scales. Moreover, I do not consider the edge of a truck scale a "bank" to which the standard refers. Scales do not accommodate two-way traffic, a circumstance that makes the installation of berms or guardrails necessary on the "banks" of "roadways."

In my opinion, any potential hazards occasioned by a truck's movement on and off a scale is otherwise addressed in 30 C.F.R. Subpart H:

> Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, visibility, and traffic, and the type of equipment used.

30 C.F.R. § 56.9101.

Accordingly, I would vacate the citation because the standard is inapplicable to the facilities cited.

/s/Michael F. Duffy
Michael F. Duffy, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 19, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2009-695-M
v.	:	A.C. No. 08-00958-187673
FLORIDA CRI, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 12, 2011, the Commission received from Florida CRI, Inc. ("Florida CRI") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 15, 2011, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to Florida CRI's failure to answer the Secretary's August 26, 2009 Petition for Assessment of Civil Penalty. The judge ordered the operator to file its answer within 30 days or it would be in default.

Florida CRI asserts that it filed a timely response to the Secretary's Petition for Assessment of Civil Penalty. Florida CRI further states that it did not receive any correspondence since it replied on August 27, 2009. However, it appears that the answer may have been sent to a Conference Litigation Representative at MSHA, instead of being filed with the Commission. The Secretary does not oppose the request to reopen.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Florida CRI's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 19, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2008-186-M
v.	:	A.C. No. 06-00400-146591
WINDHAM MATERIALS, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 24, 2011, the Commission received from Windham Materials, LLC ("Windham") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On October 23, 2009, Chief Judge Lesnick issued an Order to Show Cause in response to Windham's request for a hearing and failure to answer the Secretary's June 16, 2008 Petition for Assessment of Civil Penalty. In it, he ordered the operator to file its answer within 30 days or it would be in default. On December 2, 2010, Judge Lesnick issued an Order of Default for failing to comply with his Show Cause Order.

Windham asserts that it did not receive the Order to Show Cause or the Secretary's previously filed Petition for Assessment of Civil Penalty because they were sent to the wrong mailing address, instead of its address of record on its Legal ID Report. Windham further states that it did not receive any correspondence before it was contacted by the U.S. Department of Treasury on June 6, 2011. The Secretary does not oppose the motion to reopen.[1]

[1] It appears that the Secretary considers the operator's address of record to be 360 Plains Road, Willimantic, CT 06226, while the operator requests that mail be sent to P.O. Box 346, Willimantic, CT 06226, which it believes is the address stated on its Legal ID Report. Furthermore, many of the documents in this case that were mailed to the operator were sent to a third address.

Having reviewed Windham's request and the Secretary's response, in the interest of justice, we conclude that the Order of Default has not become a final order of the Commission because the Order to Show Cause was never received by Windham. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Windham shall file an Answer to the Show Cause Order within 30 days of the date of this order.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 22, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-549-M
v.	:	A.C. No. 41-01001-238560
TEXAS ARCHITECTURAL AGGREGATE, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 15, 2011, the Commission received from Texas Architectural Aggregate, Inc. ("Texas Architectural") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Texas Architectural's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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December 22, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2011-608 A.C. No. 23-02277-244231
CONTINENTAL COAL, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 13, 2011, the Commission received from Continental Coal, Inc. ("Continental") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Continental's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[1] Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

[1] The November 22, 2011 order dismissing this case was issued in error and is hereby vacated and set aside.

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December 22, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-749
v.	:	A.C. No. 15-17216-241663
WARRIOR COAL, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 24, 2011, the Commission received from Warrior Coal, LLC ("Warrior") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Warrior's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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December 22, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2011-591-M
v.	:	A.C. No. 21-01600-247961
HIBBING TACONITE COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On April 15, 2011, the Commission received from Hibbing Taconite Company ("Hibbing") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Hibbing's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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December 22, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2011-854-M
v.	:	A.C. No. 21-01600-256477
HIBBING TACONITE COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 8, 2011, the Commission received from Hibbing Taconite Company ("Hibbing") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Hibbing's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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December 22, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2011-625-M
v.	:	A.C. No. 44-00061-241248
BUCKINGHAM SLATE COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 16, 2011, the Commission received from Buckingham Slate Company ("Buckingham") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Buckingham's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[1] Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

[1] The November 22, 2011 order dismissing this case was issued in error and is hereby vacated and set aside.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 22, 2011

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2011-736-M
ADMINISTRATION (MSHA)	:	A.C. No. 26-00594-232581
	:	
	:	Docket No. WEST 2011-737-M
v.	:	A.C. No. 26-00594-235647
	:	
ROUND MOUNTAIN GOLD	:	
CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 15, 2011, the Commission received from Round Mountain Gold Corporation ("Round Mountain") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1] The Secretary does not oppose the requests to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2011-736-M and WEST 2011-737-M, both captioned *Round Mountain Gold Corporation*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Round Mountain's requests and the Secretary's responses, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 22, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-797-M
	:	A.C. No. 35-02875-230929-01
	:	
	:	Docket No. WEST 2011-798-M
v.	:	A.C. No. 35-02875-234079
	:	
COPELAND SAND & GRAVEL, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 29, 2011, the Commission received from Copeland Sand & Gravel, Inc. ("Copeland") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1] The Secretary does not oppose the requests to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2011-797-M and WEST 2011-798-M, both captioned *Copeland Sand & Gravel, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Copeland's requests and the Secretary's responses, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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December 23, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2011-1418
v.	:	A.C. No. 15-19327-255241
CLARK MINING, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 25, 2011, the Commission received from Clark Mining, Inc. ("Clark Mining") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

The record indicates that the proposed assessment was delivered on May 26, 2011, and became a final order of the Commission on June 27, 2011. Clark Mining's consultant[1] asserts he had not received the proposed assessment until it was faxed to him by MSHA on August 18, 2011.

The Secretary opposes the request to reopen and notes that the proposed penalty assessment was signed for by S. Clark. The Secretary states that the operator failed to provide an explanation as to why it did not contest the proposed assessment within 30 days.

The Commission sent Clark Mining's consultant a letter asking him to explain why he failed to timely contest the proposed assessment, and what office procedures were implemented to prevent such failure in the future. In response, Clark Mining's consultant asserts that he listed his name and address on MSHA's address of record form for Clark Mining, but this assessment was mailed to the mine. The consultant also states that he routinely receives mail for many companies, sets a reminder for deadlines, and files timely with MSHA. From the enclosed documents submitted by the consultant and the Secretary, it appears that the proposed assessment was mailed to the mine in Kentucky, while the address of record is the consultant's address in Virginia.

[1] The request to reopen was filed by Eddie Joe Estep, who identifies himself as a Mine Consultant for Clark Mining. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall in to one of the categories in Rule 3(b), which includes parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Estep satisfied the requirements of Rule 3 when he filed the request on behalf of Clark Mining. We have determined that, despite this, we will consider the merits of the request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Estep may represent Clark Mining only if he demonstrates to the Commission or the presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seeks permission to practice before the Commission or the judge pursuant to Rule 3(b)(4). Otherwise, Clark Mining must be represented by an attorney or by an owner, partner, officer, or employee.

Having reviewed Clark Mining's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 5, 2011

SECRETARY OF LABOR, MSHA, on behalf of CINDY L. CLAPP Complainant	:	DISCRIMINATION PROCEEDING Docket No. WEST 2010-1773-D DENV-CD 2010-12
v.	:	
CORDERO MINING, LLC, Respondent	:	Mine: Cordero Mine Mine ID : 48-00992

DECISION AND ORDER

Appearances: Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant

Laura E. Beverage, Esq., and Kristin R.B. White, Esq., Jackson Kelly PLLC, Denver, Colorado, for Respondent

Before: Judge McCarthy

I. Statement of the Case

This proceeding is before me on a Complaint of Discrimination filed by the Secretary of Labor (Secretary) on behalf of Complainant, Cindy L. Clapp (Clapp), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended. See 30 U.S.C. § 815(c)(2). The April 29, 2010 Complaint alleges that on March 18, 2010, the Respondent, Cordero Mining, LLC, terminated the employment of Clapp for exercising her statutory rights to make safety complaints to Cordero. For remedial relief, the Secretary seeks a finding of unlawful discrimination; reinstatement of Clapp to her position as Level 6 shovel operator, with full back pay, benefits, expenses and interest; an expunction remedy; costs and exemplary damages; and a $20,000 civil penalty.

On June 7, 2010, the Secretary filed an Application for Temporary Reinstatement on behalf of Clapp. Respondent timely requested a hearing. On June 28, 2010, the undersigned issued an Order of Temporary Economic Reinstatement, effective June 24, 2010, as specified in the parties' Joint Motion to Approve Settlement.

On or about September 20, 2010, Respondent filed an Answer to the Complaint admitting jurisdictional allegations, denying discrimination, and alleging that Complainant was terminated

for insubordination. The Answer further avers that the requested remedial relief is excessive, inappropriate in light of the penalty criteria in section 110(i) of the Act, and not substantially justified. As affirmative defenses, the Answer asserts, inter alia, that Clapp's discharge was based on legitimate and nondiscriminatory business reasons unrelated to any protected activity.

On November 10, 2010, during pre-hearing discovery, I issued an Order Granting Secretary's Motion To Compel Discovery, with Redaction Procedure. Essentially, I found that two specific incidents of discipline prior to Clapp's March 18, 2010 termination were time barred and never pled as substantive complaint allegations. The first involved a November 11, 2008 last and final warning letter for failure to wear a seat belt. The second involved an April 14, 2009 last and final warning letter for using the dipper of her shovel to push the front bumper of a haul truck that was stuck. Although time-barred as substantive complaint allegations, I further concluded that such evidence may be relevant as background evidence of animus and on the issue of disparate treatment. Accordingly, I permitted the Secretary to discover evidence on these issues and use such evidence for said purposes at the hearing.

An evidentiary hearing was held in Gillette, Wyoming. The parties presented testimony and documentary evidence. Witnesses were sequestered. After the close of the hearing, the parties filed post-hearing briefs.

Having duly considered the same, I conclude that Clapp engaged in activity protected by the Act, and that her protected activity motivated Cordero to terminate her employment. Considering the appropriate penalty criteria, the overarching purpose of the Act to protect miners from any retaliation for actively raising safety and health concerns, the deterrent purposes of the Act, and the evident chilling effect that Clapp's unlawful discharge had on the willingness of other miners to raise safety issues at the mine, I double the statutory penalty to $40,000.

On the entire record, including my observation of the demeanor of the witnesses,[1] and

[1] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses. Respondent objected to the testimony of complainant's witness, informant Jeffrey Stephens, because he was no longer a miner at the time of the hearing, and he was not disclosed as a witness until two days before the hearing, along with other miner witnesses. See Commission Rules 61 and 62 governing the naming of informant witness and miner witness, respectively. Respondent relied on Judge Feldman's decision in *Laurel Run Mining*, 19 FMSHRC 1607 (Sept. 1997). The Secretary countered with Commission precedent in *Bright Coal*, 6 FMSHRC 2520 (Nov. 1984) and Judge Manning's decision in *Richard Bundy v. Kennecott Utah Copper Corporation*, 24 FMSHRC 822 (Aug. 2002). Since the issue was first raised at the hearing, I ruled, out of an abundance of caution, that I would hear the testimony and entertain a motion to strike, and then revisit the issue in my decision after researching the case law cited.

(continued...)

after considering the extensive post-hearing briefs and Respondent's reply brief, I make the following:

II. Background and Findings of Fact [2]

A. The Cordero Mine Operations

Cordero Mine is a large, open-pit, surface coal mine with several miles of haul roads and ramps, located near Gillette, Wyoming. (Tr. 47). The non-union operation is owned by Cloud Peak Energy Company, following a spinoff from Rio Tinto in November 2009. (Tr. 66, 1128). The mine has won the prestigious Sentinels of Safety award five times. (Tr. 1064). Employment is at-will and Respondent has no written disciplinary policy. (Tr. 719-720, 1032). Thus, discipline is at management's discretion on a case-by-case basis, and factors considered include operator judgment, prior discipline, performance issues, and harm or damage caused by an incident. (Tr. 720, 987, 1054).

Respondent uses a truck/shovel method to mine coal. (Tr. 48, 635). Overburden dirt is drilled and blasted and then removed by drag lines to expose the coal seam. (Tr. 48). The coal seam is dug out using large shovels, which load 240-ton haul trucks that transport the coal from the pit to be dumped at hoppers at two processing plants for eventual loading on rail car. (Tr. 48-49).[3] The pit areas are accessed by ramps from the main haulage roads. (Tr. 643). Roads,

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(...continued)

Respondent never made any motion to strike at the hearing or in its post-hearing brief. In addition, having analyzed the case law cited, I agree with Judge Manning's reasoning that the Secretary is required to disclose the identity of an informant that the Secretary intends to call as a witness two days prior to the hearing, even if that informant is no longer a miner. *Richard Bundy v. Kennecott Utah Copper Corporation*, 24 FMSHRC at 828 n. 4 and accompanying text. Here, the Secretary complied with that obligation by disclosing informant Stephens as a witness two days prior to trial. Moreover, unlike the facts that Judge Feldman was presented with in *Laurel Run* Mining, Respondent filed no pre-trial motion to compel discovery of Stephens' testimony or subsequent motion to strike his alleged untimely disclosed testimony. In these circumstances, including Respondent's failure to move to strike and failure to establish any actual prejudice, I find the circumstances most analogous to *Richard Bundy v. Kennecott Utah Copper Corporation*, and agree with Judge Manning's application of Commission precedent in *Bright*. Accordingly, I consider Stephens' testimony herein.

[2] Most of the salient facts are set forth in chronological order to provide relevant background. The most critical facts involving Clapp's March 2010 safety complaints about turning around and dumping overloaded coal trucks back at the face begin at II, B, 8, *infra*, p. 20.

[3] The shovels are 40-feet long and 35-feet wide. The shovel operator sits in a cab 30 feet above ground and operates a boom that is 60-feet tall. The 55-yard bucket at the end of the boom could house a pick-up truck and weighs about 76,000 pounds. (Tr. 53-55). The 240-ton haul trucks are about 48-feet long and 25-feet wide. The operator sits 25 feet above ground. The hopper is a well-lit, managed and clean area where the trucks back onto a stable cement pad with

(continued...)

ramps and pit floors are maintained by track dozers, blades and rubber tire dozers. (Tr. 48, 51, 451, 620, 646). The coal runs or slots are about 150-170-feet wide from spoil to highwall. (Tr. 298, 649).

Three coal shovels regularly operate in coal slots to load trucks at the face near highwalls that can reach 300 feet. (Tr. 57, 72, 649-650, 846). Shovel operators are in charge of their run and integral to coordinating safe production processes in the pit through radio communication with dispatchers, drilling and blasting crews, support equipment operators, haul truck drivers and crew supervisors. (Tr. 69-70, 567). From the coal face, the shovel operators constantly monitor changing conditions and safety hazards on the highwall and in the coal slot. (Tr. 71-72). The grade of the terrain in the slot at the face of the pit can be uneven, steep, and soft, and follows the coal seam, dropping and falling and dipping and rising. (Tr. 71, 167, 417, 419, 450-52, 541, 565, 617, 620). The coal slots also can be wet and narrow with limited space for multiple vehicles to maneuver, such as the shovel, incoming and outgoing trucks, blades, and rubber tire dozers. (Tr. 52, 100, 503). Unlike at the hopper, the pit area is unlit at night and lights from the operating vehicles provide the sole illumination. (Tr. 63, 167).

There are four production crews (A-D), which average 83 miners per crew and operate on a 28-day schedule, rotating from 12 and ½ hour day shifts to 12 and ½ hour night shifts, with time off between rotations. (Tr. 67-68, 630-31, 734, 841).[4] Respondent holds a regular monthly safety meeting and a 5-minute break-out meeting every shift. (Tr. 93). Representatives from Respondent's safety and maintenance departments work the day shift and are not present at nights or on weekends. (Tr. 105, 112, 813-14).

Pay scales for production employees start at entry level 2 and progress through level 6. Each production crew has a Lead and Rotating Operations Supervisor ("ROS"). The ROS reports to the production manager, who reports to the mine manager. (Tr. 68).

Joe Vaccari has been the mine manager since 2001. Kyle Colby has been the production manager since January 2005. (Tr. 629). Gerald Fischer became the ROS on D crew in October 2006. (Tr. 465). Fisher's predecessor was Bob Brill. (Tr. 91). Dave Robinson became the leadman on D crew in April 2008. (Tr. 732). Robinson's predecessor was Wayne Franzen. (Tr. 91). Fischer and Robinson share adjacent office space, often travel together in the lead pickup, perform crew member evaluations together, and constantly communicate with each other about everything. (Tr. 108, 833, 890-91, 970). As Clapp, put it, "they are always together." (Tr. 108).

Complainant Clapp is a relatively petite woman at 5 feet, 4 inches tall. (Tr. 135). Clapp has spent the majority of her 28-year career at Cordero on the D Crew. (Tr. 67). She began as a

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(...continued)
berm, and dump the coal for crushing at the plants. (Tr. 61-63; G. Ex. 11).

[4] The mine has two primary work groups, production and maintenance. (Tr. 631-32). Maintenance is not particularly relevant to this proceeding.

haul truck driver in 1982, then operated support equipment, including blades and dozers, and has been a shovel operator since 1987. (Tr. 47). Clapp was a level 6 shovel operator at the time of her March 18, 2010 discharge. Clapp was normally assigned to the 106 shovel, although she was certified to run rubber tire dozers when her shovel was down for maintenance. (Tr. 118-19, 356). Clapp's co-workers and managers consistently lauded her as a very safe and productive shovel operator, who set the standard. (Tr. 428, 481-82, 533-34, 567, 888, 1064-65). Clapp's attendance was exemplary with perfect attendance in the 2006-2007 review period, and but one absence or sick day for the 2007-08 and 2008-09 review periods. (R. Exs. 7-9). Clapp credibly testified that she was never late for work and she never had a lost-time injury. (Tr. 80-81). Moreover, Clapp has served at the request of management on several quality improvement committees. (Tr. 77-80).

Beginning in 2006, Respondent rolled out a mine monitoring and control system (MMC, or modular mining system) and installed various monitoring devices on shovels, haul trucks, and rubber tire dozers so that efficiency, asset management, and delay could be tracked remotely by a corporate dispatch team located off site. (Tr. 635, 845). In late 2008 and early 2009, haul trucks were equipped with an updated pay load monitoring system (PLM III), a scale attached to truck struts to calculate the weight of the coal load so that the data could be shared with the modular mining system. (Tr. 636-37, 741). Basically, the PLM III system would send the data to the MMC system where it would appear on the monitor screens in the cab of the equipment and could be shared with dispatch. (Tr. 157, 636). The PLM III would not register an accurate weight reading until the load had leveled out after the truck traveled 500 feet from the shovel. (Tr. 636).

Eventually, the PLM III plan was to install governors or speed regulators to the weight system. (Tr. 666, 876). The governors would be triggered when a truck read overloaded at a pre-set weight of 260 tons. (Tr. 664). Once triggered, the governor would prevent the truck from traveling at greater than five mph. (Tr. 163, 663, 666). In a breakout meeting about the spring of 2009, Fischer and Robinson announced the governor plan to the D crew, however, the governors were not installed until about March 1, 2010, about two weeks before Clapp's discharge. (Tr. 157-59).

The main method of communication in the pit is by radio. (Tr. 70). The main mine-wide channel 3 is very busy and may be accessed by all employees. (Tr. 121, 750). Each shovel operator also has a line-of-sight channel to communicate with miners and supervisors in that coal run. (Tr. 121, 176-77, 922-23). Channel 10 was the line-of-site channel for the 106 shovel to which Clapp usually was assigned. (Tr. 176, 923).

Witnesses for both the Secretary and Respondent testified that open communication is critical to safety at the mine. (Tr. 87-88, 199, 331-32, 410, 981, 1025-1027). Robinson opined that he had a very good relationship with Clapp. (Tr. 733-34). The record clearly establishes, however, that open communication about safety issues became stifled once Fischer and Robinson became a management team in 2008. Clapp was the most outspoken advocate for safety on the D crew and became more vocal as other female co-workers such as truck drivers

Cindy Miller and Helen Clark became afraid to raise safety issues after Fischer and Robinson took over for fear of repercussions or being placed on their "hit list." (Tr. 153-156, 410, 468-470, 517-19, 611-12).[5]

B. Background Evidence of Animus and Disparate Treatment Toward Clapp's Safety-Related Complaints

1. The November 2008 Failure to Wear a Seat Belt Incident

As noted, my November 10, 2010 discovery Order time-barred this incident as a substantive complaint allegation, but permitted such evidence as background evidence of animus. The record establishes that at the end of the shift on November 1, 2008, Robinson and Fischer sent a flatbed truck to pick up seven crew members, who were working in the pit on Clapp's shovel run. (Tr. 279-80, 970-71). The pickup had only six seat belts. (Tr. 279-80, 970-71). Rather than leave a crew member down in the pit in November at shift's end, Clapp drove the vehicle at 30 mph and subsequently took responsibility for failing to wear a seatbelt, as further explained below. (Tr. 282). Extant mine policy was that anyone caught failing to wear a seat belt would receive an automatic last and final warning, although as noted, there was no written disciplinary policy at the mine and Respondent presented no documentary evidence of any such policy. (Tr. 373, 1066-67).

On route, a lunch box fell out of the pickup and was run over by a haul truck. (Tr. 373, 623-24). Within 24 hours, Clapp spoke with Fischer and Robinson about sending a pickup with insufficient seatbelts and asked for reimbursement for the lunch box. (Tr. 623-24, 1066). They declined. (Tr. 1066). The next shift, Clapp told haul truck driver Fallon Halverson in the locker room that she had spoken to Fischer and Robinson about the incident and they had not done anything about it so she was going to talk to Joe Vaccari. (Tr. 612-13, 623-24).

Clapp then explained the incident to Vaccari. (Tr. 1066). During Clapp's explanation that her supervisors sent a truck with an insufficient number of seatbelts for the crew members present, Vaccari uncovered the seat belt violation. (Tr. 373-74, 1066). Vaccari did not ask Clapp to identify who of the seven was not wearing a seat belt. Rather, Vaccari told Clapp's "supervisor" about the issue for follow up. (Tr. 1067).

Later that day, after speaking with Clapp in the locker room, Halverson's truck broke down. (Tr. 611-13). Robinson told Halverson to wait in the lead pickup truck for a ride to another piece of equipment. The lead's pickup truck was parked outside the main office building where Vaccari's office was located upstairs. (Tr. 621, 624). Halverson waited for a

[5] Although Respondent's counsel correctly points out that this is not a case concerning gender discrimination (Tr. 427), the record establishes that Fischer and Robinson intimidated and made women such as Cindy Clapp, Helen Clark, Fallon Halverson, Cindy Miller, and Michelle Whitted uncomfortable concerning discussion of safety issues. (Tr. 153-56, 426-427, 517-25, 535-37, 609-613, 625-26).

long time in the back seat of the pickup for Robinson and Fischer to return from the office building where Vaccari worked. (Tr. 611-12, 624). Halverson testified that when Fischer and Robinson finally came out of the office building and got back in the truck, both were angry and Fischer said, "That bitch, we'll show her who's boss. How dare her go over our heads. I can't believe she did this and said anything to Joe." (Tr. 612).[6] Halverson felt very uncomfortable and assumed that Fischer was talking about Clapp because earlier that day Clapp told Halverson that she was going to talk to Vaccari about the seat belt incident. (Tr. 612, 625).

Respondent initially decided to issue all seven miners a last and final warning because Respondent did not know who did not wear a seat belt. Clapp, however, came forward and said she would take the letter. (Tr. 373-74). On November 11, 2008, Fischer issued Clapp a last and final warning for failing to wear a seat belt. (R. Ex. 4). Thereafter, Clapp spoke to Vaccari about the warning because she thought "last and final" was a little steep. (Tr. 283). Vaccari assured Clapp that she would not be fired after another incident, unless it was a seat belt violation. (Tr. 284).

On rather scripted direct examination, Fischer was asked but a single question about the seat belt violation, admitting he was involved in the process, but "probably not" the decision. I am unpersuaded by Fischer's attempt to distance himself from this incident and from Halverson's testimony. Fischer never denied the remarks attributed to him by Halverson. Robinson merely could not recall an incident in the pickup with Halverson where Fischer referred to someone as a "bitch." (Tr. 810-11).

I credit current employee Halverson's specific, detailed and vivid testimony against self-interest pursuant to subpoena as production manager Kolby sat through the hearing. I infer that Fischer's animus was directed at Clapp, who brought the issue to Vaccari's attention.[7]

Clapp lost a bonus and received a last and final warning for the seat belt incident. (Tr. 276). With respect to the issue of disparate treatment, Clapp's unrebutted testimony established that about December or January 2009, shortly after she was disciplined for the seat belt incident, she overheard several conversations over the radio between pit mechanic Bruce Lang and Fischer and Robinson. During the conversations, Clapp heard the audible seat belt beeper in Lang's pickup truck continue to go off. (Tr. 276-278). After overhearing several such conversations and concluding that Fischer and Robinson were not going to enforce the seat belt policy, Clapp asked a haul truck driver to speak with Lang about wearing his seat belt. (Tr. 277). Thereafter, Clapp did not hear the seat belt beeper go off when Lang spoke over the radio.

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[6] On questioning from the undersigned, Halverson did not waiver and reaffirmed the substance of Fischer's remarks: "That bitch, I can't believe she did that to us. We'll show her who is boss, going over our heads like that." (Tr. 625).

[7] In addition, having observed Fischer's demeanor on the witness stand, and heard and reviewed the totality of record evidence concerning his conduct as a supervisor, Fischer impressed me as a mean-spirited individual bent on making his mark as a supervisor. As the record evidence demonstrates, in most instances, it was Fischer's way or the highway.

(Tr. 278-79). Clapp testified that she knew that Lang was not disciplined for failure to wear his seat belt because Respondent provided no evidence of such discipline during discovery. (Tr. 278-79).

In short, although Clapp received an automatic last and final warning for the seat belt violation, there was no written documentation confirming this policy, it apparently was not enforced by Fischer against Lang,[8] and Clapp's warning followed closely on the heels of Fischer's animus toward Clapp for bringing the safety issue to Vaccari's attention, including the fact that Fischer sent a pickup with an insufficient number of seatbelts to transport the November night crew, who had been working in the pit.

2. Clapp's Safety Complaints That Monitor Screen Placement Impaired Visibility in Rubber Tire Dozers and the 103 Shovel

In early 2009, Respondent began placing large, bulky GPS screens in the right-corner, front window of the cabs in the rubber tire dozers (RTDs). (Tr. 116-17). About early February 2009, two dozer operators, Leann Schneider and Blair Stugelmeyer told Clapp over Channel 10 that the screen placement was blocking their vision in the coal run. (Tr. 120-122).[9] Clapp, Schneider and Stugelmeyer expressed impaired vision concerns to Robinson and Fischer at a line-out meeting about this time. (Tr. 122-25). Schneider cited a specific incident where a fully-loaded, 240-ton coal truck completely disappeared from her view at a mine intersection. Clapp also specifically expressed concerns about impaired vision at said line-out meeting. (Tr. 125). In response to these concerns, Fischer retorted, "We're not moving them screens. We are using them screens, get used to it." (Tr. 124).

On February 22, 2009, Clapp was assigned to operate the 325 rubber tire dozer for recertification purposes. (125-27, G. Ex. 15, p. 1). Clapp testified that she was very uncomfortable operating the dozer because the screen blocked her vision. (Tr. 127). Clapp completed a pre-shift report, which she gave to maintenance after operating the equipment. On the pre-shift form, Clapp wrote: "I run this 4 hours a year or would have shut it down for that 12 inch TV screen you have in the cab - unrunable - unneeded." (Tr. 127, G. Ex. 15, p.). Prior to giving the form to maintenance, Clapp showed the form to Robinson to let him know that she did not want to run equipment with monitors that blocked her vision. Robinson replied, "[R]espondent won't be moving them screens." (Tr. 127).

On March 1, 2009, Clapp operated the 328 rubber tire dozer. (Tr. 128, G. Ex. 15, p. 2). Clapp completed another pre-shift report on which she wrote, inter alia, "2 and 12: inside the cab in front of the right window, a GPS screen has been installed (sic) it is a safety hazard (sic) it is a 12 in (sic) screen and blocks your view where you can't even see a 240 ton (sic) truck (sic) this

[8] Respondent offered no evidence to the contrary.

[9] In fact, Stugelmeyer told Clapp that he had an accident, and his head hit the monitor. (Tr. 133).

screen is about 200 times the size of a cell phone." (G. Exh. 15, p, 2). In the section of the form concerning "Shut Down Items," Clapp made the handwritten notation "GPS screen?" Clapp turned the form into maintenance. (Tr. 129). She testified that she probably showed the form to Robinson, but definitively could not recall showing the form to supervision. (Tr. 129).

Fischer did not know exactly when the GPS screens were placed on the RTDs, but testified that they were taken from the shovels and placed in the RTDs when the shovels were upgraded with the MMC screens. (Tr. 857, 861). Fischer recalled only one complaint from Clapp about GPS placement in a rubber tire dozer, but could not recall when Clapp had complained. (Tr. 859, 862). Fischer testified that he went to the RTD that Clapp was operating, looked at the placement of the GPS monitor, discussed alternative placement and reached a resolution with Clapp by moving a radio and raising the GPS screen four inches to enhance visibility. Fischer, however, refused to concede that there had been any visibility problem with the placement of the GPS screen. (Tr. 860).

Robinson admitted that Clapp told him the screens were a hazard because "it's like driving around with a TV screen in your front window." According to Robinson, however, no other RTD operators expressed similar concerns. (Tr. 797). I discredit such testimony. Based on demeanor, the generality of Robinson's testimony, and the specificity of Clapp's testimony, I find that miners Clapp, Schneider and Stugelmeyer expressed impaired vision concerns to Robinson and Fischer about the placement of large GPS screens in RTDs at a line-out meeting in early 2009.

On March 21, 2009, Clapp was assigned to the 103 shovel, instead of her normal 106 shovel. She completed a pre-shift report for the 103 shovel. (Tr. 134; G. Ex. 16, p. 1). In the section of the report involving "Safety and Operating Checks," Clapp wrote "left window blocked." At the bottom of the report, Clapp wrote, "Needs MMC screen moved right away. (sic) Haven't run this shovel. (sic) Screen in wrong place blocking left spot to see RTD." (G. Exh. 16, p. 1). Clapp testified that the monitor blocked her field of vision from the left window of the cab, which was the only place that she could look across the whole roof of the machine and see the ground, where smaller equipment might have entered the area unannounced. (Tr. 134-35).[10] At the end of her shift, Clapp showed the report to Fischer and Robinson and asked Robinson to have maintenance fix the problem. (Tr. 136, 138). According to Clapp, Robinson said he would "check on it." (Tr. 138).

Robinson testified that Clapp's March 2009 complaint that the screen be moved in the 103 shovel was passed along to the truck/shovel planner and MMC personnel and production manager Colby. Without further explanation, Robinson testified that "it's not really something we can do in-house. We can't send a mechanic out there to move it." (Tr. 794).

[10] Clapp had designated the placement of the monitor on the 106 shovel that she normally operated. (Tr. 793-794).

As discussed below, Clapp followed up on the issue a couple of months later and was told by Fischer and Robinson that they were not going to move that screen. (Tr. 138). When Clapp followed up with maintenance mechanic Bunker, however, she was told that he had already moved the screen. (Tr. 139). Bunker did not testify.

3. Clapp's Initial Safety Complaints About Unmanned Rubber Tire Dozers Parked Behind Her Shovel

About March or April 2009, Clapp complained to Fischer and Robinson in safety meetings, in private discussion, and by radio from the pit, about rubber tire dozers that had been parked unmanned behind her shovel while the RTD operator ran other equipment, such as the blade. (Tr. 97-99). Clapp credibly testified that she was not given an opportunity to specify her safety concerns. (Tr. 98-99). Rather, Fischer and Robinson told her they did not care what her concerns were, that it was not unsafe to park the unmanned dozer behind the shovel. (Tr. 99). At the hearing, Clapp identified a litany of reasons why the practice was unsafe, including entrapment upon spoil failure. (Tr. 100-01).

4. Clapp's Penultimate "Last and Final" Warning For Minor Property Damage to a Haul Truck Stuck Under a Highwall

A. The Penultimate "Last and Final" Warning

On April 16, 2009, Clapp received another last and final warning from Fischer for minor property damage that her shovel caused to a haul truck on April 7, 2009. (Tr. 369-372; R. Ex 3). As noted, my discovery Order barred this incident as a substantive complaint allegation, but permitted such evidence as background evidence of animus and disparate treatment.

Clapp testified that a truck driver swung an *empty* haul truck into the slot to receive a swing load of coal and became stuck under the highwall and could not break free. (Tr. 267). Clapp did not want him under the highwall because "there is no safe highwall," although Clapp conceded that she saw no "imminent hazards" on the highwall at the time. (Tr. 267, 370). Clapp called Robinson and explained that an *empty* coal truck came in for a load and "got sucked up against the highwall facing the coal dig face," and there was room in front of the truck for Clapp to put her shovel bucket down and push the truck out. (Tr. 267, 370). Robinson relied, "Okay. Call if you need anything." (Tr. 267). Clapp then pulled her shovel out of the bank, placed her bucket down on the ground in front of the truck bumper, and pushed the truck out. (Tr. 267). During the process, the mounting ladder on the truck broke causing $250 dollars worth of property damage. (Tr. 267-68, 718).

As a result of the incident, Clapp endured three disciplinary meetings – one in town and two at the mine – and was suspended without pay for two days and lost the second quarter

payout for performance pay. (Tr. 268; R. Ex. 3).[11] The warning cites Clapp's "poor judgment" and unacceptable performance and leadership by failing to assess the risks and ensure safe operations. Although Fischer's warning and Colby's incident report make no mention of Clapp's alleged failure to fully report the extent of the damage, Colby suggested that such alleged omission was encompassed within poor judgment. (Tr. 688). The warning stated that "[a]ny additional safety incidents or performance-related issue will result in termination of your employment." (R. Ex. 3).

Respondent's witnesses painted a different picture. Robinson testified that Clapp called to report "a truck stuck in the – or under the high – not under the – she said she had a truck stuck under the shovel, but she thought she could get it out." (Tr. 790). Robinson testified that he told Clapp that the utility crew was in the area and to give them a call if she needed help, but Clapp told Robinson she thought she could manage, so Robinson told her to be careful. (Tr. 79). Robinson testified that he had no idea that Clapp intended to walk her shovel across the coal face and push the bumper of the truck out with her bucket. (Tr. 790-91). Robinson testified that had he understood that to be Clapp's intent, he would have told Clapp to leave the truck alone until the utility crew arrived to pull the truck out. (Tr. 791).

I discredit this testimony from Robinson. At the outset, I find Robinson's incipient verbal leak very telling. As noted, Robinson started to testify that the truck was stuck under the highwall as opposed to under the shovel. I discredit his testimony that Clapp told him the truck was stuck under the shovel as opposed to under the highwall. When asked what his understanding of "stuck under the shovel" meant, Robinson explained that the truck was loaded up with coal and could not pull away from the shovel, and he described a practice of placing the shovel dipper in the back of a loaded haul truck to push on the coal to dislodge the stuck truck. (Tr. 789-90). I credit Clapp, however, and find that she expressly told Robinson that the truck was empty. I note that production manager Colby confirmed that the truck had not turned for its swing-by yet, and therefore would be empty for loading. (Tr. 682). Therefore, the practice of pushing on the loaded coal with the dipper, which Robinson described, and Clapp candidly acknowledged (Tr. 370), was not viable in this instance. Rather, I find that Clapp told Robinson that there was room in front of the empty truck for Clapp to put her shovel bucket down and push the truck out from under the highwall, and that Robinson gave tacit approval for Clapp to do so. (Tr. 267, 370, 971-72).

Colby testified that the general rule is to avoid placing metal to metal because one can damage the equipment, and in most instances a choker was hooked up to the truck to pull it out with another piece of equipment. (Tr. 681). Colby also testified that utility should have been called to complete this task. (Tr. 682, 688). As production lead, Robinson should have been aware of such standard protocol. It would appear that Robinson did little if anything to exercise his own leadership and judgment skills when Clapp called him to report the situation. I find that Robinson's version of events was tailored to divert attention away from facts suggesting that he

[11] For property damage over $3,000, a miner is automatically removed from performance pay for a quarter, but anything less is subject to management's discretion. (Tr. 719).

knew exactly what Clapp had proposed, and thus failed as production leadman to make appropriate inquiries to ensure a full understanding of the scenario before tacitly approving Clapp's solution, instead of calling utility. In any event, Robinson testified that he did not want to see Clapp terminated for the incident. (Tr. 793).

Clapp called Robinson after the incident to report that she had pushed the truck out, but there was a broken bolt on the ladder. (Tr. 791). The truck operator for the oncoming shift later called Robinson and suggested that there was more extensive damage. (Tr. (Tr. 791-92). Robinson, Fischer and Colby investigated and Fischer took photographs of the damage, which established that a railing had been broken off, and some paint had been removed where the shovel had pushed on a step. (Tr. 682, 686-88; R. Exh. 2). The truck was taken out of service for the minor repairs. (Tr. 686).

Colby completed an incident review interview form after meeting with Fischer, Robinson and Clapp. (Tr. 680; R. Ex 2). Colby's report notes that the stuck truck was "next to [the] highwall" and Clapp "made [the] decision to move truck with bucket." Colby further noted that the incident was reported immediately by Clapp, and that Clapp's solution to prevent recurrence was "call for supervision," which is exactly what she did. Finally, Colby's report highlighted Clapp's previous seat belt incident in November 2008. (R. Ex. 2).

Robinson and Fischer both testified that they did not realize that Clapp was on a last and final warning until the incident review with Colby, who suggested that Clapp could be terminated. (Tr. 721-22, 793, 893-94). Robinson and Fischer told Colby that despite Clapp's lapse of judgment, they did not want Clapp terminated for the property damage incident. (Tr. 721-22, 793, 874). As Fisher fully explained, he, Robinson and Colby considered the fact that Clapp was a very productive operator, that no one except Clapp had been placed on a last and final warning under the new seat belt policy, and that management was willing to go to bat for Clapp if there was anything they could do to keep her around any longer. (Tr. 874).

Accordingly, as a result of the minor property damage incident in April 2009, Clapp received another last and final warning and a two-day suspension without pay, and she lost second-quarter performance pay. (Tr. 268; R. Ex. 3).[12]

Clapp's annual performance appraisal appeared to decline under Fisher, who testified that her performance had declined with respect to safety infractions. (Tr. 886). With regard to team functioning and leadership, Fischer noted that Clapp "has taken a step back in the leadership area by continually 'bucking' MMC," by which Fischer meant not utilizing it. (Tr. G. Ex. 27; R. Ex. 7; Tr. 887). Similarly, with regard to personal effort, working with others, dependability and flexibility, Fischer noted that "we would like to see some improvement in the area of personal effort. Cindy, at time needs to work on attitude. She can be argumentative on issues already

[12] Colby testified, without further explanation, that they visited with HR and Vaccari after this incident review. (Tr. 686).

discussed. If a decision has been made it is final, don't beat a dead horse. Another area to work on would be dealing with the utilities and dispatch . . ." (*Id;* Tr. 889-890).

B. Clapp's Disparate Treatment Allegations

1. Christiansen

With respect to the issue of disparate disciplinary treatment, Clapp alleges that D crew miners Doug Christiansen and Bob Eisenhauer were treated more favorably than she was treated. The record reflects that on March 10, 2009, Christiansen cut and damaged a large and *very expensive* electrical trail cable that he failed to pick up when moving his shovel. (Tr. 270, 693; G. Ex. 18). Christiansen received a verbal warning to pay more attention. This warning noted that he had no "recent" discipline. (Tr. 271; G. Ex. 18).[13] Three months later, on June 15, 2009, Christiansen had an accident while driving a scraper too fast for conditions. He hit a V-ditch and injured his back and damaged the vehicle's fender. (Tr. 271; G. Exs. 19 and 20). The incident review noted that after the accident, damage was found on the scraper that was related to the incident. This incident report, unlike the March incident report, stated that Christiansen has had two to three incidents a year. (G. Ex. 20). Christiansen received a written warning from Fischer dated July 2, 2009 for this safety incident. (G. Ex. 20).[14]

While somewhat equivocal given Clapp's last and final warning status for the seat belt violation, I find sufficient probative evidence of disparate treatment concerning Respondent's discipline of Christiansen vis-a-vis Clapp. First, there is no evidence that Christiansen was outspoken about safety concerns. Although Clapp received an automatic last and final warning for the seat belt violation, as noted above, it is suspect and does appear unduly harsh because there was no written documentation confirming this policy, Clapp was the only person to receive a warning under the policy, the policy apparently was not enforced by Fischer against Lang, and Clapp's warning followed closely on the heels of Fischer's animus toward Clapp for bringing the issue to Vaccari's attention. Perhaps more importantly, however, after the seat belt warning,

[13] No explanation of the word "recent" was provided by Respondent. As noted below, however, another incident report (G. Ex. 20) written just three months later, stated that Christiansen had two to three incidents a year. (G. Ex. 20). I find the later incident report more reliable since it specifies a specific time frame, and it was issued after a second incident that involved a personal injury accident and under circumstances in which a more thorough examination of past discipline would be expected.

[14] This warning recited, inter alia, the responsibility of each employee to take proper precautions, complete a thorough risk assessment and follow proper procedures to ensure safe operations. It reminded Christiansen of the need to be aware of his surroundings and maintain control of equipment being operated at all times. It further stated that as a step-up lead, Christiansen was expected to set a good example and provide leadership to employees working in his area. The warning concluded that future incidents may result in further disciplinary action, up to and including termination. (G. Ex. 20).

which was Clapp's first documented incident of discipline, Clapp received another last and final warning for minor property damage totaling $250 and she was suspended for two days without pay and lost a second-quarter performance bonus. The $3,000 threshold for loss of performance pay for the quarter was not even triggered by Clapp's incident, yet management exercised its unbridled discretion not only to eliminate the quarterly bonus, but to impose another last and final warning and to suspend Clapp for two days without pay.

By contrast, Christiansen received a mere verbal warning for damaging a very expensive electrical cable. Although Colby testified that the level of damage done by Clapp to the truck and by Christiansen to the cable was "probably fairly close," I am not persuaded that this is the case because my experience confirms Clapp's testimony that a large electrical cable powering the shovel is very costly, and may cost thousands of dollars to replace. (Tr. 270). In addition, while Colby attempted to justify the harsher treatment of Clapp by testifying that Christiansen had no previous disciplinary action, the incident review regarding Christiansen's accident, which caused personal injury and minor property damage just three months later, belies Colby's testimony and documents that Christiansen had two to three incidents a year. (G. Ex. 2). Furthermore, I have found that when Clapp caused minor damage to the haul truck that was stuck under the highwall by pushing it with the dipper on her shovel, she had Robinson's tacit approval and fully explained the scenario to him. Christiansen, by contrast, was driving too fast and lost control of Respondent's scraper. Thus, no mitigating circumstances excused his continuing poor judgment. (Tr. 696). Yet as Colby testified, Christiansen received but a written warning for both incidents. (Tr. 697). In these circumstances, I find contrary to Colby's opinion, that Clapp was indeed treated less favorably than Christiansen. (Tr. 697).

I also credit Clapp's testimony that Fischer, in essence, admitted his favorable treatment of Christiansen, after Clapp told Fischer that Christiansen had been talking to Clapp about Christiansen's accidents. (Tr. 266). According to Clapp's unrebutted testimony, Fischer got very scared and said, "Doug Christiansen better not be talking to you about what I am doing for him. He better not be talking to you." (Tr. 266). I find Clapp's unrebutted testimony to be an admission against interest by Fischer of favorable treatment toward Christiansen. Cf. Fed. R. Evid. 801(d)(2).

2. Eisenhauer

I also conclude that there is sufficient probative evidence to warrant the inference that Clapp was disciplined more harshly than Bob Eisenhauer based on her recent safety complaints. First, haul truck driver, Cindy Miller, credibly testified that Eisenhauer was not outspoken about safety issues (Tr. 540), and the record is replete with evidence that Clapp constantly raised concerns about the safety of herself and other miners. (Tr. 430, 482-83; see generally Tr. 97-257). In addition, the record also reflects that miner Eisenhauer was involved in two, successive property damage incidents on June 13 and 14, 2009, respectively. (Tr. 607-98; G. Ex. 21-23).

Clapp overheard the June 13, 2009 incident on the radio. (Tr. 261-62, 402). Clapp testified that Eisenhauer was operating a track dozer when a coal truck loaded with trash got

stuck at the trash dump and Eisenhauer attempted to dislodge the stuck truck with the dozer. (Tr. 261-62, 401-02). Fischer, Robinson, and utility personnel were present at the dump watching Eisenhauer. Clapp heard Robinson and utility personnel tell Eisenhauer to be careful and watch what he was doing so as not to damage the truck or dozer. (Tr. 262, 402). Clapp then heard Eisenhauer tell Robinson, "Don't tell me what to do, Dave. Don't tell me what to do. I can see what I am doing. I don't need any help," comments which Clapp considered insubordinate. (Tr. 262, 402). After making such comments, Eisenhauer hit the truck with the dozer and broke the light on the dozer. (Tr. 264, 698; G. Ex. 22).[15]

Haul truck driver Miller also heard the discussion over the radio and essentially corroborated Clapp's version of events. (Tr. 537-38). After Eisenhauer's accident, Miller worked with the utility crew. Miller's truck pulled out the stuck truck. (Tr. 538). Miller testified that Eisenhauer was sent for a drug test (Tr. 538). Clapp later observed Eisenhauer return to work that day on a rubber tire dozer in her area. (Tr. 263, 265). Eisenhauer did not receive any discipline that day.

The next day, June 14, 2009, Eisenhauer had another accident when operating a piece of equipment in the coal run. Eisenhauer collided with another operator due to inattention and lack of communication between operators, and broke the hoist cylinder on a blade. (Tr. 698; G. Ex. 21, p. 2). Eisenhauer was given only one warning for both incidents of property damage on June 13 and 14, 2009. (Tr. 698; G. Ex. 21).[16]

Colby testified that Eisenhauer had no prior discipline in his file and was a member of the safety committee. (Tr. 698). When asked by the undersigned why Eisenhauer did not receive two warnings, Colby testified that the two incidents were close together and the first one involved a fairly minor incident with damage to a light, but since Eisenhauer was not focused and had another incident that was more critical, "we just put both incidents together in one letter." (Tr. 698-699). By contrast, for Clapp's first incident involving minor property damage, Clapp received a second last and final warning, was suspended for two days without pay, and lost a second-quarter performance bonus.[17]

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[15] Clapp was told through an unidentified source that Eisenhauer also broke the hydraulic lines on the dozer. (Tr. 286-87). I decline to give any weight to this hearsay, absent some independent corroboration.

[16] The warning emphasized the responsibility of each employee to take proper precautions, complete a thorough risk assessment, communicate and follow proper procedures to ensure safe operations, and concluded that any additional safety incidents will lead to further disciplinary action, up to and including termination. (G. Ex. 21).

[17] As noted above, Clapp received her initial last and final warning for a seat belt violation that she took responsibility for after complaining to Vaccari that Robinson and Fischer sent a crew pickup vehicle with an insufficient number of seatbelts for crew members that they should have known were present.

On September 2, 2009, based on poor judgment and incident history, Eisenhauer received a last and final warning for an incident that occurred on August 13, 2009. Eisenhauer bent a steel on a drill, did not report the incident to his supervisor until over a week later, and tried to hide the incident from discovery. The warning stated that Eisenhauer demonstrated poor judgment by not reporting the incident immediately and trying to conceal the damage. The warning further emphasized Eisenhauer's incident history and documented that he had two property damage incidents in 2006, two property damage incidents in 2007, and three property damage incidents in 2009, with a written warning issued on June 16, 2009. Eisenhauer was removed from performance pay for the third quarter of 2009 and was demoted from a Level 5 driller to a Level 3 haul truck operator. (Tr. 699; G. Ex. 23). Colby testified that Eisenhauer was not suspended for two and-one half days or sent home because Respondent felt his problem warranted longer-term disciplinary action. (Tr. 700).

In response to a leading question from counsel, Colby then testified that Eisenhauer's discipline was more severe than Clapp's in light of the two-step downgrade (Tr. 701), but I am not so easily persuaded. First of all, Eisenhauer got a free pass on his first property damage incident in 2009. In addition, although Colby testified that Eisenhauer had no prior discipline in his file, the September 2 last and final warning reveals that Eisenhauer had two property damage incidents in 2006 and two property damage incidents in 2007. Furthermore, Eisenhauer had three property damage incidents in 2009, and failed to report and tried to conceal damage concerning the third 2009 incident. Clapp's disciplinary history was hardly comparable and the harshness of her disciplinary warnings has been shown to be suspect. In these circumstances, I conclude that there is sufficient probative evidence in the record to warrant the inference that Clapp was disciplined more harshly than Eisenhauer based on her recent safety complaints.

5. In July 2009, Clapp Moves the MMC Screen That Was Blocking Her Vision in the 103 Shovel

A. The July 13, 2009 Incident

Clapp again was assigned to the 103 shovel on July 13, 2009, when her shovel was down. (Tr. 140, 794; G. Ex. 16, p. 2). Clapp testified that contrary to what Bunker told her after her March 2009 complaints, the screen had not been moved. (Tr. 140). Fischer testified that Respondent had put in a request to have the screen moved and he corroborated Robinson's testimony that Respondent did not know that the screen had not been moved when Clapp was again assigned to the 103 shovel on July 13, 2009. (Tr. 863).

On her July 13, 2009 pre-shift report, Clapp noted that the "MMC screen needs [to be moved] so that it doesn't block my vision." (Tr. 140, G. Ex. 16, p. 2). Clapp also noted that the adjustable foot rest was broken and was not high enough. Because Clapp had asked that the screen be moved back in March and it still had not been moved, Clapp called Robinson and

informed him that she was going to ask utility to bring her tools so that she could adjust the screen in order to see better. According to Clapp, Robinson said, "Okay." (Tr. 141).[18]

When the utility person arrived to adjust the mounted screen by tilting it down as in Clapp's shovel, Clapp determined that it blocked the control panel on this shovel. (Tr. 141-142). Clapp decided to leave the screen plugged in and operational,[19] but remove it from the mounted bracket, make a pad for it with clean flannel shirt rags, and place it against the wall behind the shovel seat. (Tr. 142). Clapp asked the utility person to inform Fischer and Robinson that Clapp had moved the screen. (Tr. 143).[20]

Later that shift, Fischer called Clapp and told her to park her shovel as he and Robinson were coming to her cab. (Tr. 144). According to Clapp, when Fischer arrived, he immediately started yelling at her, noting that the screen was a $20,000 piece of equipment that could not be moved. Clapp indicated that she had moved screens before when Bob Brill and Wayne Franzer were her supervisors.[21] Fischer said he did not care what she did on other crews, "you can't move this screen." When Fischer put the screen back in the window, Clapp said, "I'm safer than you Gerald. I'm safer than you. I have got to have vision in my shovel. I need to see. I'm responsible down here for not injuring anybody. I have to have my vision." (Tr. 145). Clapp credibly testified that Fischer became furious and yelled at her loudly, "You are not safer than me." As Fischer adjusted the screen, he yelled, "It doesn't bother me, it doesn't bother me at all. It doesn't bother anybody but you. Bend over and look under it." (Tr. 146-47).[22]

Although Fischer denied raising his voice, I credit Clapp. (Tr. 864). According to Fischer, Clapp became pretty angry when Fischer remounted the screen. By his account, Clapp started yelling that she did not think he was safe, that he did not care about safety, and that he had never run a shovel before and should read the shovel manual. (Tr. 863, 867). According to Robinson, Clapp and Fischer had words, but Clapp did not appear angry that the screen had not

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[18] Clapp testified that she had previously taken such action with her former ROS supervisor, Bob Brill. (Tr. 90-91, 141).

[19] Dispatch communicates over the screen by audible beap.

[20] Robinson testified that Clapp called him and said that she was she was going to call utility to adjust the screen. Robinson testified that he was later informed by the utility person that Clapp had instructed him to take the screen down and lay it behind the seat of the shovel. Robinson testified that it was inappropriate for Clapp to remove the screen. Rather, he suggested that she could have called him to arrange something different. Robinson claimed that he did not realize, until he assigned Clapp to the 103 shovel that evening, that the screen had not been moved since March. (Tr. 795).

[21] Robinson corroborated this by testifying that Clapp told them that Wayne Franzen, the prior lead on D crew, had taken the screen down before and laid it on a rag. (Tr. 796).

[22] Robinson conceded that the gist of the conversation involved Clapp's claim that the screen created a hazard that prevented her from seeing other vehicles such as a rubber tire dozer. (Tr. 796). Robinson testified that both he and Fischer could operate the shovel and see out the window. (Tr. 796-97).

been moved. (Tr. 796). I credit Fischer and find that Clapp responded in kind. Fischer considered Clapp's remarks demeaning. He testified that he did care about safety and did not think Clapp was safer than he was safe. (Tr. 863-64). I find that Clapp's remarks were indeed provocative, but provoked by Fischer's angry outburst and refusal to recognize her safety concern.

Fischer sent Clapp to the pickup truck while the screen was remounted. (Tr. 865). Fischer testified that he and Robinson then both operated the shovel and made "improvements" regarding placement of the screen. He further testified that he experienced no visibility problems, but admitted, and the record confirms, that each shovel operator adjusts seat placement based on height, which may affect vision. (Tr. 135, 865, 454). As noted, Clapp was relatively short at 5 feet, 4 inches tall. I find that given her height, Clapp's vision was indeed impaired.

Fischer took Clapp off the shovel for the rest of the day and assigned Doug Christiansen to run it. (Tr. 146).

B. The July 13, 2009 Meeting Concerning the Incident

Fischer and Robinson drove Clapp back to the ROS office, slammed the door, and began an aggressive verbal assault on Clapp. (Tr. 147-48). Fischer began yelling and screaming, "I don't care about the screen in that window. It doesn't matter to anybody else. It doesn't bother me. Bend over and look under it." (Tr. 148). Fischer told Clapp that he could make her work in uncomfortable situations such as placing her in a track dozer at the top of a highwall, and that she would do that job until Fischer arrived, even if she thought it was unsafe. (Tr. 149-50). Clapp told Fischer that she will never do anything unsafe like that and she would park the dozer and wait for Fischer to come get her. (Tr. 149). Clapp told Fischer and Robinson that she needed vision for her safety and the safety of others on her coal run. Fischer and Robinson responded that the decision to use the monitors was coming from the top and was above their heads, and they could not do anything about it, so Clapp better get use to it. (Tr. 150-51). Clapp testified that she felt hurt, demeaned, shocked, and scared for the safety of miners because her safety complaints were ignored and not passed up the chain of command for appropriate problem-solving. (Tr. 149-151).

Fischer testified that the purpose of the July 13, 2009 meeting was to address the tone of the "false accusations" that Clapp made while he was attempting to remount the screen. (Tr. 866). Fischer testified that he told Clapp that he was not going to tolerate such outbursts, where she was screaming in his ear. He told her that she was bordering on insubordination, and was on two last and final warnings, so if he sent her home, the outcome was not going to be good. Fischer further testified that he told Clapp that it was better to work the issue out, discuss it, and move past it, and that he would put her back to work if Clapp thought she could work the rest of the night safely. (Tr. 871). Fischer testified that Clapp agreed with him and he felt that they "worked it out that evening." (Tr. 875). Accordingly, Fischer did not discipline or send Clapp

home for insubordination. Rather, he "documented what happened in that meeting and we worked through it." *Id.*

Robinson did not testify about the closed door meeting with Clapp on July 13, 2009.[23] Even assuming arguendo that Clapp's remarks toward Fischer bordered on insubordinate conduct on this occasion, I find herein that Fischer both provoked and condoned Clapp's conduct.

After the hour-long meeting, Clapp was assigned to run the blade the rest of the evening. (Tr. 870). She credibly testified that she felt hurt, scared, disappointed and afraid for her safety, and after speaking to her husband about the "emotionally devastating" incident, she decided that she would not let that happen again, without a witness. (Tr. 200, 204).[24]

6. Clapp's Safety Complaints About Dusty Conditions in the Pit and Her Repeated Requests for Water Trucks

Clapp testified that on occasion she would need water for dust control at the shovel. "It's dusty and you can't see, it's a health hazard, and I would call . . . over the radio for water." D-crew driver Miller confirmed that dusty conditions are definitely a problem down in the pit because a rubber tire dozer or blade operator would be down there performing their tasks when haul trucks would drive by and raise all kinds of dust such that one could no longer see the smaller equipment. (Tr. 526).

Miller recalled operating a water truck about the summer of 2009. When it began to rain, Fischer and Robinson called Miller and instructed her to park the water truck and get in their pickup. (Tr. 520-21).[25] When Miller got in the back seat, Clapp called over the radio and asked for a water truck. Miller credibly testified that Robinson then turned to Fischer and said, "I don't care how many times she calls she is not getting a water truck." (Tr. 521).[26]

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[23] Clapp testified that sometime in July 2009, driver Cindy Miller called Clapp at home, very upset and crying about the fact that Miller had made a pre-shift suggestion to Robinson in private about water truck procedure and operating scrapers. Miller told Clapp that Robinson and Fischer took her into the back office and told her that she makes them look stupid by telling them how to do their job. Miller further told Clapp that she made an appointment with HR to discuss the situation, but Robinson and Fischer were present for the meeting, and "ganged up on her." (Tr. 153-55).

[24] As noted below, when a similar meeting took place on March 10, 2010, just days before Clapp's March 18, 2010 discharge, Clapp recorded the meeting on tape.

[25] As Miller explained, given the large expanse of the mine, just because it is raining in one section does not mean it is raining in another. (Tr. 521).

[26] Fischer could not recall any such remark by Robinson, but testified that had he heard such a remark, he probably would have asked Robinson for an explanation. I credit Miller's specific recollection in her testimony against self-interest, pursuant to the Secretary's subpoena.

Clapp testified that throughout 2009, and more often in the winter months of late 2009 and early 2010, she called Robinson and Fischer several times to request water, but her requests were ignored. (Tr. 108-09, 116). Miller confirmed that water trucks occasionally are used in the pit during the winter months. (Tr. 526). Clapp also called Fischer and Robinson during this time frame on behalf of several truck drivers on her crew, including Helen Clark, Fallon Halverson, and Bob Brown, because their requests for water were also ignored and they, unlike Clapp, chose not to risk angering Fischer or Robinson by continuing to call for water. (Tr. 112-115). On two occasions during this time frame, Clapp called Fischer and Robinson to inform them that she was shutting down the run because neither she, nor the truck drivers, could see with the pit engulfed in dust. (Tr. 109-10). Once Clapp shut down the run, Fischer and Robinson immediately sent water. (Tr. 110).[27]

In January of 2010, Clapp went to speak to the head of the mine's safety department, Jimmy Andrews. Clapp told Andrews that she was having problems when she asked for a water truck during the winter months and that she needed his help. (Tr. 111). According to Clapp, Andrews was very receptive and told her that he would get her water. Clapp testified that she was then serviced by a water truck during day-shift rotation when the safety department was present, but continued to have problems on nights and weekends when no one from safety was on-site. (Tr. 111-12).

7. In January 2010, Clapp Raises Continuing Concerns About Unmanned Rubber Tire Dozers Parked Behind Her Shovel With The Safety Department

In January 2010, Clapp continued to raise safety concerns about unmanned rubber tire dozers parked behind her shovel with Tyler McLaughlin from the safety department. (Tr. 103-04). Clapp and McLaughlin rode in Clapp's shovel and McLaughlin was very receptive to solving Clapp's safety concerns about the issue. Clapp also informed McLaughlin that she suspected that the practice had now become deliberate after she raised her safety concerns with Fischer and Robinson earlier in the year. According to Clapp, this allegation troubled McLaughlin, who asked for time to think about how to handle that allegation. (Tr. 104). Thereafter, the rubber tire dozer was not parked unmanned behind Clapp's shovel during day shifts when the safety department was present, but the practice continued on nights and weekends. (Tr. 104-105).

8. Clapp's Safety Complaints About Turning Around and Dumping Overloaded Coal Trucks Back at the Coal Face

A. The March 2, 2010 Line-Out Meeting

[27] Robinson could not recall Clapp shutting down a run because it was too dusty. (Tr. 738). I credit Clapp's specific recollection over Robinson's inability to recall the work refusals. Moreover, on cross, Clapp confirmed work refusals. (Tr. 300).

On March 1, 2010, Respondent installed the governors (speed regulators) on haul trucks operating the day shift. D crew returned for night shift rotation on March 2, 2010. Clapp credibly testified that during the 5-minute, March 2 line-out meeting for night shift, Robinson announced to D crew that the governors had been installed and would be triggered when a haul truck registered as overloaded, thus preventing the truck from traveling at greater than five mph. Robinson told the crew to turn the truck around and dump it back at the coal face if the governor was triggered, and if anyone had a problem with that, take it to Colin Marshall. Colin Marshall was the Respondent's Chief Executive Officer. (Tr. 159-160; G. Exh. 17A p. 55).

Clapp testified that miners were not given an opportunity to raise any concern during the meeting. "There was no talking whatsoever. It was meeting over, go to work. Clapp did not recall raising any safety concern during the brief line-out meeting. (Tr. 160). Haul truck driver Michelle Whitted, by contrast, recalled that Clapp voiced her concern that it was not safe to have a loaded haul truck turning around in the slot and dumping at the face and Clapp asked her supervisors whether and when the dump-back procedure had become a policy. (Tr. 561-64). Whitted testified that Clapp was not allowed to say a whole lot because "they told her that if she had a problem with it, she should take it to Colin Marshall." (Tr. 562). Whitted testified that she believed it was Fischer, and not Robinson, who made the Colin Marshall statement at a 7 a.m. line-out meeting before day shift. (Tr. 562-63). Haul truck driver Halverson testified that Clapp and Miller raised concerns about dumping loaded coal trucks back at the coal face "in the line-out meetings," but did not specify which meetings. (Tr. 617).

Robinson testified that he told the night-shift D crew during the March 2 line-out that the governors had been installed on day shift with some problems. He testified that he told the crew that if the governors were triggered, then the trucks should be turned around and dumped at the face and the truck number reported to Robinson so that the truck could be re-calibrated by day-shift mechanics. He further told the crew that the truck should be light loaded the rest of the evening. (Tr. 740, 747; R. Ex. 18, which states ". . . light load that truck the rest of the shift. . . ."). Robinson corroborated Clapp that no one raised any safety concern at that time, but omitted any reference to Colin Marshall. (Tr. 747; R. Ex. 18).

I credit Clapp and Robinson that no specific safety concern was raised by Clapp at the March 2 line-out meeting, although I find that Robinson did make the remark about Colin Marshall. In this regard, I note that Whitted's recollection of this meeting was inaccurate, and Halverson's testimony lacked specificity.

B. The March 2, 2010 Radio Discussion About Truck Dumping Procedure

Later that shift, after Clapp loaded haul truck no. 271 driven by Vic Young, Young called Clapp on the line-of-site channel. Young told Clapp that his governor had kicked in about 1,000 feet down the slot, that his truck had slowed to 5 mph, and that (notwithstanding Robinson's directive) he did not know what to do. (Tr. 168, 170-71). Clapp testified that she was about to

finish up her cut at the highwall when Young called to tell her that his truck was overloaded. Clapp testified that the two other coal shovels had broken down and therefore seven empty trucks would be coming down her run soon. (Tr. **173).**

Clapp told Young, "I don't want to dump that truck down here, Vic. Take it to the hopper." (Tr. 170). At that point, haul truck driver, Fallon Halverson, who had entered the run to be loaded, joined the line-of-site channel discussion. Halverson told Clapp and Young that the drivers had been directed in the line-out meeting to turn the trucks around if the governor kicked in and to dump the load in the coal face. (Tr. 17). After some further discussion back and forth, Clapp told Young to park the truck on the cable side and not to move it, while she called Robinson on the main channel. (Tr. 171-72).

According to Clapp's credible testimony, when Robinson answered, Clapp told him that truck no. 271 was overloaded with coal and that she did not want to dump the truck at the face. Clapp asked Robinson if he was sure that he did not want Clapp to let the truck proceed to the hopper. Robinson told Clapp that he was sure, and he directed her to have the truck turned around and dumped in the coal face. Clapp told Robinson that it was "stupid and unsafe" to do so, but she complied with his directive and instructed Young to dump his truck back at the face. (Tr. 172, 177).[28] Fischer admitted at the subsequent March 10 meeting discussed below, that he condoned Clapp's conduct and remarks on this occasion: "So I put that one aside. I let her vent a little bit. I didn't say much about it, but it did bother me . . . . (G. Exh. 17A, p. 48).

Before allowing Young to dump back at the face, Clapp asked Young to wait until she had finished maintaining the high wall and had cleared the other trucks in the run. Clapp finished her highwall cut and filled up the other trucks to minimize exposure to the high wall. Clapp then moved her shovel back and summoned a dozer to clean up the area so that Young could dump safely back at the face, about 40 minutes after he called to report his truck was

[28] The Secretary relies on Halverson's testimony that she overheard Clapp tell Fischer and Robinson that she did not think it was safe *to turn the truck around* and dump back at the face. (Sec'y Br. at 14, citing Halverson's testimony at 618). Halverson's testimony that Clapp told Robinson on the radio on March 2 why she thought the policy was unsafe, i.e., that it was not safe to turn the trucks around in the slot, conflicts with Clapp's testimony that she did not do so because Robinson did not ask. (Tr. 180). The Secretary also relies on Robinson's admissions in G. Ex. 17A, p. 53 -- the surreptitious recording that Clapp made of the March 10, 2010 meeting with Robinson, Fischer and HR representative Kirk Babcock, further discussed below -- that Clapp argued about the dump back procedure and raised a "safety trump" during the March 2 radio conversation by telling Robinson that it was unsafe to dump the trucks at the face. In addition, Robinson's own notes of the conversation confirm that Clapp told Robinson that "it was a safety issue dumping trucks at the face as they would have to turn the truck around in traffic in the slot and back it under the shovel which she thought was dangerous." (R. Ex. 18, lines 11-13). In these circumstances, I find that the preponderance of the evidence establishes that Clapp was mistaken when testifying that she did not tell Robinson over the radio on the March 2-3 night shift why it was unsafe to follow the truck-dumping procedure.

overloaded. (Tr. 173, 178). Clapp explained that she refused to dump a loaded coal truck under an unsafe high wall. (Tr. 178).

Clapp had no more overloaded trucks that shift. (Tr. 178). Although Respondent argues that Clapp light loaded all night to avoid triggering the governors (Tr. 337; 1120-21), Clapp explained to Fischer during the subsequent March 10, 2010 meeting that she only light loaded for one set of high scales on Young's truck that evening. (G. Ex. 17A, p. 56).[29] After shift change the morning of March 3, Clapp told Young that she did not feel safe dumping coal trucks down in the shovel loading area because she did not want trucks to tip over and she thought that it was a dangerous place to turn trucks around. Young said he understood. (Tr. 178-79).

After handing in her time card, Clapp spoke to mine manager Vaccari in the hallway to express her safety concerns about the truck dumping procedure. (Tr. 181-82). Clapp told Vaccari that she thought it was unsafe to turn around and dump loaded coal trucks in the uneven pit and she asked him why Respondent was doing this. (Tr. 182-83, 1115). Clapp opined that one could not overload coal trucks and testified that Vaccari agreed with her. According to Clapp, they talked about the inaccuracies of the scales. (Tr. 183-84). During the discussion with Vaccari, Clapp saw Robinson and then Fischer step out into the hallway about 15 feet away and give her dirty, angry looks behind Vaccari's back. (Tr. 185-86). The discussion ended when Vaccari said that he was not aware of this new policy of turning around overloaded coal trucks to dump back at the face, and that he would check into it and report back to Clapp. (Tr. 183-84).

Although Vaccari had difficulty at the hearing remembering what was said during this March 3, 2010 hallway encounter with Clapp, on cross examination he was presented with his deposition in which he confirmed that Clapp expressed concerns about dumping at the face because of an uneven floor. (Tr. 1115). Vaccari also admitted discussing ways to address Clapp's concerns with Robinson and Fischer. (Tr. 1119). Moreover, Vaccari sent an e-mail to Fischer to inform him of his conversation with Clapp, but Respondent did not produce the e-mail at trial. (Tr. 930).

At the hearing, the credible testimony of numerous other miners corroborated Clapp's testimony that turning around and dumping loaded coal trucks back at the face raised various safety concerns, but those employees, unlike Clapp, did not report their concerns to management. (Tr. 417-19, 446, 449-453) (Artz); 503 (Stephens); 541, 552 (Miller); 565, 585-86 (Whitted); and 619-20 (Halverson)). Even Robinson conceded that there was a safety risk in dumping back at the face due to ground conditions, but noted that shovel operators could summon a rubber tire dozer and blade to "spot up" the area where the truck was going to dump to minimize the risk. (Tr. 744). Although Respondent attempted to show otherwise, the credible testimony of Artz, Miller and Halverson also established that turning loaded coal trucks around in the slot and

[29] In any event, Respondent witnesses do not rely on light loading as a basis for finding Clapp insubordinate and discharging her.

dumping then back at the face instead of at the hopper was a "new task" for which miners had not been trained. (Tr. 447, 549-52, 619-21).[30]

C. Clapp Calls Supervisor Oistad to Express Her Safety Concerns

Clapp credibly testified that she could not sleep when she returned home after shift change on March 3 because she was concerned about the truck dumping policy, the fact that she was instructed to dump Young's overloaded coal truck in the face, and the fact that Robinson had told the crew during the line-out meeting that if they had a problem with the procedure, to take it to Colin Marshall. (Tr. 187). Clapp called ROS, Terry Oistad, a long-tenured miner like Clapp, who was working day shift, to express her concerns about the truck-dumping procedure. Clapp told Oistad that she was afraid to turn around trucks and have them raise their beds and dump coal down in the congested coal slot, particularly in light of recent truck accidents that had occurred at the mine in late winter and early spring. Clapp told Oistad that she felt that Respondent was pushing the line on safety by taking risks that were unnecessary. (Tr. 189, 1023-24).

According to Clapp, Oistad was very receptive and told her that his crew was not always turning trucks around and dumping back at the coal face when a governor was triggered. (Tr. 189-90). Rather, Oistad told Clapp that he would send overloaded trucks to the hopper when conditions in the pit were not favorable for dumping, and that he had sent coal trucks to the hopper once the governors kicked in to ascertain how long the trip would take. (Tr. 190). Oistad also told Clapp that Helen Clark's truck had not been hooked up to the governor system on March 2 because management knew that the truck scales were reading very high weight. (Tr. 192).

Oistad conceded in his testimony that Clapp raised safety concerns regarding congestion in the slot. (Tr. 1023-24). Oistad told Fischer and Robinson that Clapp had called him to express her concerns about the truck-dumping policy. (Tr. 773-74, 919-20).

To the extent that Oistad's testimony is inconsistent with Clapp's testimony, I credit Clapp. Clapp's testimony about her conversation with Oistad did not place Oistad in a favorable light with respect to his support of Respondent's case. Having observed Oistad testify, I find that he carefully hedged his testimony to limit the damage to both himself and Respondent.

D. The Events of March 9, 2010

The D crew was off from March 5 until March 9, when they returned for day shifts. (Tr. 765). Late into the day shift on March 9, driver Clark called Clapp and told her that the mechanics had pulled over Clark's truck (no. 262) to install the governor system. Clapp asked

[30] 30 C.F.R. § 48.7(a) and (c) requires that miners assigned to a new task shall be instructed in the safety and health aspects and safe work procedures of performing such task. *See Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261-62 (D.C. Cir. 2005).

Clark if the mechanics were also calibrating her truck. Clark told Clapp that she did not know. (Tr. 192). After the governor was installed, Clark proceeded to Clapp's shovel to be loaded. Shortly after Clark left Clapp's shovel with her load, the governor on Clark's truck was triggered. Clark called Clapp on line-of-sight channel 10 and asked Clapp what to do because the governor had kicked in on her overloaded truck. (Tr. 192).

As Clark called, Clapp saw Fischer and Robinson enter the coal run and park their pickup directly across from Clark's truck. (Tr. 192-93). Clapp told Clark that Clark was going to have to dump the truck because nothing had changed and Vaccari had not gotten back to Clapp. Clapp further told Clark that if Clark wanted, she could call Fischer and Robinson, who were now parked right across from Clark.

Clapp testified that Fischer then began screaming over the line-of-site channel that he did not care what Joe Vaccari says because this was Fischer's policy not Vaccari's policy, so turn that truck around and dump it in the coal face.[31] Fischer acknowledged that Clapp's remarks really angered him. "So that really chapped me. I don't know what Joe will come up with. I don't know what his policy is." (G. Ex. 17, G. Ex. 17A, pp. 51). As Fischer put it, "that was the straw that broke the camel's back," because it was Fischer's decision, not Vaccari's policy. (*Id*.).

[31] Respondent relies on truck driver Miller's testimony that she overheard the conversation on the radio and the tone of the conversation was "just like any other talking, other than when Fischer said, 'This is my policy.'" (Tr. 529). Miller did not elaborate.

Fischer's initial recollection of the conversation was hazy (Tr. 918-19), and Fischer did not deny raising his voice when he essentially told Clapp that this was his policy on D Crew, not Vaccari's policy or mine policy. (Tr. 921-22). Given Fischer's history of yelling at Clapp as set forth in the July 13, 2009 incident when Clapp moved the MMC screen that was blocking her vision in the 103 shovel, I credit Clapp, as partially corroborated by Miller, that Fischer was yelling at Clapp over the radio when he told her to dump the truck because it was his policy, not Vaccari's policy. (Tr. 193, 321).

Respondent also relies on the testimony of D-crew haul truck driver, Mark Chaplin, that he overheard Clark asked Clapp on the radio whether she was supposed to bring the load back, and Clapp told her "no, take it to the hopper." (Tr. 996). Chaplin further testified that he did not hear Clapp say anything after that and did not recall whether Clark said anything. (Tr. 995-96). Chaplin further testified that he heard Robinson come on the radio and tell Clark to dump the overloaded truck and Robinson was not yelling. I do not credit Chaplin's testimony. His testimony is in apparent conflict with Clapp's and Fischer's and I find his recollection vague, faulty and unreliable.

Clapp followed Fischer's intemperate directive and backed her shovel up a little bit so that Clark could dump in a better spot. (Tr. 193). Clapp credibly testified that she felt uncomfortable dumping Clark's truck that evening because she believed it was unsafe, but because Robinson and Fischer did not want to talk about the procedure, she felt compelled to follow their directive. (Tr. 194).

Robinson testified that at the end of the shift on March 9, Clark told Robinson that she was upset because she felt that truck drivers were being put in the middle between supervisors and shovel operators with regard to dumping trucks at the face. Clark also purportedly told Robinson that she was afraid to tell Clapp that she was overloaded because Clapp would be angry with her. (Tr. 768). Robinson told Clark that the decision had already been made to dump overloaded trucks at the face, which took truck drivers out of the equation.

Robinson further testified that after Clark spoke with him, truck driver Young also spoke with him. Robinson asked Young whether he felt uncomfortable and felt like he was being placed in the middle. According to Robinson, Young did not want to discuss the issue, but said that he could "see where somebody could think that." (Tr. 769).

Respondent did not call or subpoena either Clark or Young to testify. Accordingly, I give Robinson's hearsay testimony little weight. Moreover, I note that Respondent witnesses did not establish that they it relied on the argument that Clapp allegedly made other drivers uncomfortable as a basis for finding her insubordinate and terminating her.

Robinson told Fischer about his discussions with truck drivers Clark and Young. (Tr. 770). Robinson and Fischer decided they would meet with Clapp before shift the next day because she was not following their directive with regard to the truck dumping policy, and "she wasn't acting like a leader on our crew" by going to Vaccari and Oistad instead of Robinson and Fischer with her [safety] concerns, by arguing with Robinson and Fischer over the radio, and by making truck drivers feel uncomfortable. (Tr. 770-71, 928-29).

E. The March 10, 2010 Meeting

1. The Beginning of the Meeting

On March 10, 2010, Clapp was assigned to operate her regular 106 shovel. After the normal break-out meeting, however, Robinson tapped Clapp on the shoulder and asked her to meet with him and Fischer in the ROS office. (Tr. 196). Given the "emotionally devastating" closed-door meeting that Clapp had previously had with Fischer and Robinson on July 13, 2009, Clapp went to the bathroom, retrieved a digital recorder from her lunch box, and surreptitiously recorded the meeting. (Tr. 200-04).[32]

[32] Wyoming is a one-party consent state. (Tr. 201-02). It is lawful to intercept a communication if one is a party to the communication or has received the prior consent of a (continued...)

At the outset of the March 10, 2010 meeting between Robinson, Fischer, and Clapp,[33] Robinson immediately referenced the line-of-sight radio conversation the day before when Clapp told Clark that she had not heard back from Vaccari about her safety concerns with the truck dumping policy. Robinson said that from a truck driver's perspective, Clapp's decision to go over his head made it look like Robinson did not know what he was talking about. (Tr. 198, G. Ex. 17, G. Ex. 17A, p. 2.). Clapp reminded Robinson that he had told the crew that if they had a problem with the truck dumping policy, they should speak to Colin Marshall. Robinson explained that he was not going to fight this battle because this is coming down from the top. (G. Ex. 17A, p. 2). So Clapp challenged Robinson as to why he would think a truck driver would perceive Robinson as not knowing what he was talking about if she followed the chain of command and took the issue to Vaccari. (*Id*. at 2-3). "And you said if you have a problem with that, go to Colin Marshall. You told us to go up. I have a problem with it. And you have never talked to me about it and you don't want to because you said in that meeting if you have a problem, go up there. So I went to Joe . . . ." and called the other bosses to see what they were doing because there is no communication here. (*Id*. at 3).

Fischer then interrupted and told Clapp that Robinson wanted to talk about how Clapp handled the issue on the radio the first night on March 2 when Young's truck was overloaded, not last night when Clark's truck was overloaded. (*Id*.). Fischer also indicated that he (Fischer) wanted to talk to Clapp about talking to other bosses. Although acknowledging that Clapp could call whoever she wanted, Fischer stated that he did not care how other crews did business, and reminded Clapp that he was running D crew, not Joe Vaccari. (*Id*. at 4). Clapp said, "Whatever. This is a mine site with four crews." Fischer then reminded Clapp that she was on D crew and asked whether she agreed that she was in a position of leadership. Clapp responded, "I agree you don't have any communication out here." *(Id*.) Fischer said, "Well, let's have it?" Clapp again noted that Robinson had directed her elsewhere with her problems. (*Id*. at 4-5). Robinson then offered the explanation that he did so because Clapp was "pissed on the radio"

(...continued)
party to the communication. See Wyo. Stat. §7-3-602(b)(iv). Accordingly, the original DVD recording and transcript of audible portions of the recording were marked for identification, properly authenticated, and received into evidence as G. Exs. 17 and 17A, respectively, after Respondent withdrew its objection to the transcript. (Tr. 19-30, 210-15, 228). The transcript of the meeting itself is about 69 pages long. I summarize the crux of the meeting below. (G. Ex. 17A).

[33] Human Resource representative Kirk Babcock eventually joined the meeting, as set forth below. He reported to HR manager Doug Nutting, who reported to HR director Clemetson. (Tr. 1028–29.) Babcock impressed me as a relatively inexperienced human resource generalist, who held a Bachelor of Arts in telecommunications and had completed a 10-week, self-study program for a certification from the Society for Human Resources Management in June 2010. In my view, his remarks toward the end of the meeting essentially admonishing Clapp that questioning the policy over the radio and going outside the crew with her concerns was improper and undermined her supervisors' authority (see G.C. Ex. 17A, p. 60-61 and 67-68), reflected ignorance of protected activity under the Mine Act.

and disagreed with Robinson's decision to dump [Young's] truck, and that Robinson he did not want to fight with Clapp over the radio. Clapp then explained that she did not want to argue over the radio either, and that is why she directed the drivers to call Robinson if they have an overloaded truck that Respondent was not fixing. *(Id*. at 5). Clapp then directly acknowledged that she understood Robinson's directive to dump overloaded trucks, and light load them, if necessary, to get through the night (*Id*. at 5-6), but she again reminded Robinson that he told the crew that if they had a problem with the policy, go to Colin [Marshall], so she went to Joe [Vaccari]. "That's not undermining you. You flat told us you didn't want to talk about it," Clapp said. (*Id.* at 6).

Fischer then told Clapp that Respondent reneged on Robinson's comment and henceforth "we want you to come to us first." Clapp initially responded, "No, [Robinson] said go to Colin Marshall." Fischer reiterated, "from here forth, we want you to come to us first." Clapp replied, "Well, you're pissed because I went to Joe." (*Id*.) Fischer said that he was "pissed off" because Clapp told Joe that she had light loaded her trucks all night long. Fischer then instructed Clapp, "Don't light load your trucks all night long." Clapp responded, "Everybody is. Why are you concentrating on me?" Fischer answered, "Because you are throwing the biggest fit . . . ." Clapp denied throwing a fit, but Fischer rejoined that Clapp threw a fit over the radio. (*Id*. at 7). The two then went back and forth --yes you did, no I did not -- like a couple of pre-schoolers, until Clapp suggested that Joe [Vaccari] be in the meeting because Fischer would believe what he wanted to believe and that's all." Fischer then stated, "Well, I'm going to tell you, I'm not believing nothing." Clapp then told Fischer, "I don't care what you tell me." (*Id*. at 8).

Fischer then told Clapp where she stood with him because he was tired of these meetings also. Fischer noted that Clapp was first on his seniority list, and that she was a very production-oriented shovel operator, whom he was proud of, but "[i]t's the other stuff that you need help with because you buck the system. You don't like any changes." *(Id*. at 8-9.) When Clapp responded that she communicates, Fischer told her that she was "making life miserable with everything except loading coal in those trucks." Fischer then told Clapp that she needed to be a leader, that she can't stop everything that comes down, that she needed to support the crew and company, that she did not, and that he was not asking her to do so, he was telling her to do so, and if she could not do that then "change will be made." (*Id*. at 9.) Fischer further told Clapp that he was fed up with "fighting" with her, that "we're going to enjoy our jobs" and "were going to gel, and we're going to get along, and we're going to lead, and we're going to succeed from the top, which carries on to the bottom," and that he was not going to have truck drivers who were scared to dump their loads. (*Id.* at 10). Fischer added, "The shovel operator is going to take them loads at the face because that is what we want, because we run this crew. Joe don't. Terry Oistad don't. Okay?" (*Id*.)

When Fischer indicated that he was finished speaking, Clapp told Fischer that "[c]ommunication is one of the biggest things in safety," which needs to be mine-site wide, and the biggest part of communication is listening, not talking." When Fischer told Clapp that it works both ways, Clapp basically told Fischer that he can't listen after he gets angry. Clapp told Fischer that she had a problem with the truck dumping policy, that she had been sent above

Fischer's head and had nothing to hide, and that Robinson's statement to take her problem to Colin Marshall led Clapp to conclude that Robinson and Fischer had already made their decision and did not want to talk about the issue. (*Id.* at 11). So Clapp explained that she took the issue "up the ladder" and asked Joe Vaccari why Respondent was dumping loaded coal trucks and why Respondent even had scales, and Vaccari advised Clapp that he never heard of a policy of dumping a loaded coal truck in the pit and he would check into the matter. (*Id*. at 12) Clapp then explained that the reason she called out to the mine and spoke with Oistad was to foster communication across the mine site by asking what other crews were doing, and that nothing she does is a secret. (*Id*. at 12-13).[34]

Clapp told Fischer that every time we come in here, you are so angry like during the July 13, 2009 MMC screen incident when you were so pissed off and screaming at me and told me that you could make my work uncomfortable. "What the hell is that?" (*Id.* at 13).

Fischer then denied telling Clapp that he could make her work uncomfortable. Clapp told Fischer that is exactly what he said, and the two argued over the point until Fischer stated that he was not afraid to put Clapp [on a track dozer] in an uncomfortable situation out in the mine. (*Id*. at 13.. Clapp reminded Fischer that she had told him at the time that she would not work in an uncomfortable situation, and would park the vehicle until Fischer arrived, because safety is one of her top priorities, to which Fischer responded, "Well, I'm glad you're getting on board." (Tr. 14). On board, Clapp inquired, "I have 28 years," to which Fischer responded, "You throw a lot of bullshit around." Clapp replied, "Whatever. You do. You're good at it." The childish bickering then degenerated into a disagreement about whether Clapp acted like she had 28 years of safety, who valued safety more, and the fact that Fischer took offense at being accused of lying over exactly what he had said, until Clapp refocused the meeting on communication. (*Id*. at 14-15).

Fischer then told Clapp that telling his boss (Vaccari) that Clapp light loaded trucks all night is not acting like a leader, and he instructed Clapp not to light load all night. Having admitted that he knew that Clapp had done so, Fischer then began to grill Clapp about whether she told Vaccari that she light loaded trucks all night. Initially, Clapp deflected the inquiry by noting that Helen Clark's truck had been hooked up to the governors and not calibrated. (*Id*. at 16). Then Clapp said, "Yeah, we back off." Fischer then asked whether Clapp told Vaccari that she did not light load all night, and whether she lied to Vaccari. Clapp told Fischer to pull the records up and look, and Fischer asked, aren't you the one complaining about communication. When Clapp asked Fischer if he knew how the scale works, Fischer again asked Clapp whether she told Vaccari that she light loaded all night. Clapp responded, according to the scale, no. Fischer then told Clapp that he could not get an answer out of her to a simple question, to which Clapp responded, I just answered you. Fischer asked again whether Clapp told Vaccari that she light loaded all night. Clapp responded that there was a problem with the scales. (*Id*. at 170). Fischer asked again whether Clapp told Vaccari that she light loaded all

[34] I note, however, that Clapp was surreptitiously taping the conversation as she uttered this remark because of her experience at the July 13, 2009 meeting in Fischer's office.

night, to which Clapp responded, according to the scale, yes. Fischer then told Clapp that she told Vaccari that she light loaded all night because Fischer heard her tell Vaccari that. (*Id.* at 18).

2. Babcock Joins the Meeting

When HR representative Babcock eventually joined the meeting despite Clapp's requests for Vaccari (Tr. 775, 819; G. Ex. 17A, pp. 28 and 35), Clapp explained to Babcock that Robinson and Fischer were mad at her for communicating her safety concerns to Vaccari. (G. Ex. 17A, pp. 36-38). Babcock told her, "Well in this case the way the policy is set …. then you go with what the policy is …. If you are told that you need to turn a truck around, that it's overweight, then you do just that. And if the question is out there and it's being looked at, you just trust that the powers that be are looking at it. But until you get word of, you know, you don't have to do this anymore, continue with the policy as is." (*Id*. at 39). Babcock further told Clapp that she should not broadcast her concerns to her supervisors over the radio as it could be viewed as questioning authority. (*Id*. at 40-42).

Fischer explained to Babcock that he was bothered by the fact that Clapp gave Robinson "a lot of feedback and flack on the radio," and really got his "dander up" when she asked Oisted what his crew was doing and told Vaccari that she had to light load the trucks. (*Id*. at 46-49). Fischer further explained that "the straw that broke the camel's back" was the incident of March 9 when Clapp told Clark that Vaccari had not gotten back to her about the truck dumping policy. (*Id.* at 50-51). Robinson agreed with Fischer that as of March 9, Clapp still did not agree with the truck dumping policy and was intent on going to Vaccari, and that back on March 2, she "pulled a safety trump on me" by saying it was unsafe to dump at the face over the radio. (*Id.* at 52-53).

When Clapp insisted to Fischer that she could talk to anybody she wanted concerning her safety concerns (*Id.* at 57), Fischer opined that Clapp had not learned a single thing during the meeting (*Id.* at 59), and Babcock admonished Clapp that questioning the policy over the radio and going outside the crew with her concerns was improper and undermined her supervisors' authority, which he expected her to follow. (*Id.* at 60-61). Clapp indicated that she was communicating her safety concerns and not undermining authority, and that Cordero focused on her for communicating her concerns when other crews were driving down the road and dumping at the hopper (*Id.* at 62-63).[35] Thereafter Clapp took a bathroom break. (*Id.* at 67).

[35] I note that haul truck driver Artz credibly testified that he had actually taken an overloaded haul truck to the hopper and management was aware of it through the MMC system, but did not discipline him for the refusal to follow instructions. (Tr. 422-23). Similarly, Whitted credibly testified that Robinson was aware that Young took an overloaded truck to the hopper and Respondent introduced no evidence that Young received any discipline for the failure to follow Robinson's instructions to dump back at the face. (Tr. 581-83).

3. Clapp's Restroom Break and Meeting with Safety

When Clapp initially returned from the bathroom, Cliff Oedekoven, a utility person, told her that Fischer, Robinson and Babcock needed some additional time to talk in private and they would come get Clapp when they were ready to reconvene. (Tr. 230-31). While she waited, Clapp went to the safety department to raise her safety concerns with the truck-dumping procedure and because she was emotionally upset and uncomfortable about the fact that she had been pulled into the back room again because her safety concerns were not being addressed. (Tr. 231-32.)

Josh Tompkins, a safety representative, was meeting with Michelle Whitted, a D-crew haul truck driver and member of the safety training team. (Tr. 231, 234, 268). Whitted was telling Tompkins that communication had closed down and there was no longer any open door policy. She asked Tompkins for advice. (Tr. 569-570). Thompson told her to call the "Speak Out" line,[36] or talk to Vaccari.

At that point, Clapp walked in and complained about the meeting she was having with Fischer and Robinson. (Tr. 232, 569). Clapp and Whitted then spoke to Tompkins about the truck-dumping procedure and the "March madness" safety incentive game. (Tr. 233, 570). Clapp told Thompson that she felt the truck-dumping procedure was unsafe, but she had been instructed not to talk to Robinson and Fischer about it because Robinson told the D-Crew in the line-out meeting that if you have a problem with the procedure, take it to the top. Clapp also told Tompkins that she had spoken to Vaccari about the truck-dumping procedure and Robinson and Fischer were mad at her for talking to Vaccari. Clapp further told Tompkins that Robinson and Fischer were unapproachable and that one could not communicate with them. (Tr. 233).

Whitted told Tompkins that she gets often "dragged in the back room" with Robinson and Fischer, and mentioned a recent incident involving the "March madness" safety incentive game. (Tr. 235-36). According to Clapp, Tompkins told them that he had been hearing a lot of bad things about Fischer allegedly throwing away employee safety suggestions and discouraging miners from playing the safety incentive game. (Tr. 236). Tompkins told Clapp and Whitted that they needed to get help and let someone know how they were being treated at the mine. (Tr. 236-37). According to Clapp, Tompkins, Clapp and Whitted discussed three options, the Speak Out program, Human Resources (HR), or Joe Vaccari. (Tr. 237). Clapp and Whitted opined that the Speak Out program was inappropriate because it was outside the mine, and that HR did not keep matters confidential and made employees feel uncomfortable. According to Clapp, Tompkins concurred with the notion that HR did not keep matters confidential, and he told them they needed to let Vaccari know what was going on. (Tr. 237, 570).

[36] Clapp described the Speak Out line as a program outside the mine that employees could call with confidential concerns. (Tr. 238).

On the other hand, Tompkins testified that Clapp was upset and remained in his office for about an hour, but he could not recall whether Clapp raised any safety concerns. (Tr. 1008). Tompkins further testified that he told Clapp to follow the chain of command and go through Robinson and Fischer, Colby, and then Vaccari with her concerns.

I was unimpressed by Tompkin's testimony and inability to recall, and I credit Clapp and Whitted that they spoke to Tompkins about the truck-dumping procedure and the safety incentive game. (Tr. 253, 570). Tompkins struck me as a witness who had been well prepped to rebut damaging statements attributed to him against the company by Clapp and Whitted, and I find his testimony generally untrustworthy and an effort to make amends. In any event, I credit the mutually corroborative testimony of Clapp and Whitted that they raised safety concerns with this lower-echelon, safety representative.

4. The Resumption and Conclusion of the March 10 Meeting and the Events Following That Meeting

During the discussion with safety representative Tompkins, Clapp was summoned to return to the meeting with Robinson, Fischer and Babcock. (Tr. 238). When Clapp returned to the meeting, Babcock told Clapp that there were some concerns about her ability to follow the chain of command and communicate through Robinson and Fischer about her concerns, and since emotions were high and management had safety concerns about sending Clapp out on the shovel, they had decided to send her home with pay.[37] Babcock said, "You can take the day. Think about it, and then come in tomorrow ready to go. We'll finish up the conversation tomorrow, and then, you know, and go from there. But the bottom line is that . . . any concerns have to go through them [Robinson and Fischer]. Okay?" (G. Ex. 17A, p. 67-68).[38]

Clapp affirmatively acknowledged the need to communicate through Robinson and Fischer, explained that she does communicate with them and follow the chain of command, and explained why she did not come to them with the truck-dumping procedure because she was told to go elsewhere, i.e., to Colin Marshall. She further explained that there had been no attempt to undermine them, just a breakdown of communication. (*Id*. at 68; Tr. 238). Finally, Babcock admonished Clapp that as a leading crew member, if she disagreed with management policy, she should bring it to management's attention in a one-on-one conversation, but not argue with management over the radio. (*Id*. at 68-69). Clapp agreed that she would follow procedure and the meeting ended. (*Id*. at 69).

Fischer testified that after Clapp left the meeting, he, Robinson and Babcock continued to discuss what they were going to do about Clapp. Fischer recommended to HR (apparently

[37] Clapp described this as discipline, i.e., being sent home with a penalty-pay day. (Tr. 238-39). The Secretary does not raise this discipline as a separate complaint allegation.

[38] Babcock conceded on cross examination that he did not set a specific meeting place, time or agenda, nor specify who would attend. Rather, he just instructed Clapp to report to work at the normal time. (Tr. 1054).

Babcock), that Clapp be demoted to a level 5 shovel operator because Clapp would not answer or communicate with him and was not taking a leadership role as a level 6 shovel operator. (Tr. 952-53). There was no discussion about terminating Clapp at that point. (Tr. 954). On March 10, Babcock briefed Vaccari about what occurred during the meeting with Clapp earlier that day. (Tr. 1087).

Babcock testified that after Clapp left the March 10 meeting, Babcock, Colby, Fischer and Robinson decided to give Clapp a written letter of discipline demoting her to a level 5 shovel operator because of the lack of leadership that she was showing. (Tr. 1041-42). When asked what the basis for his support of that decision was, Babcock testified, "Insubordination she had shown during the last couple of weeks." (Tr. 1042). When asked to explain, Babcock testified that he meant the questioning of authority that [Robinson] and [Fischer] had given her, the comments that Clapp made over the radio to her crew, and the lack of acknowledgment during the March 10 meeting that Robinson and Fischer were her supervisors. (Tr. 1042).[39]

After the meeting ended, Clapp went back to safety representative Tompkin's office. Clapp testified that she felt, hurt, scared, emotional, and stressed after the meeting because her safety concerns were not being addressed. When asked by the undersigned why she was scared, Clapp explained: "I'm scared for my coworkers' safety and mine. You can't talk about safety out there. You can't approach Dave and Gerald." (Tr. 240).

Tompkins asked Clapp if she was okay. When Clapp said no, Tompkins handed her a piece of paper with his phone number and the phone numbers for HR and Vaccari. Tompkins told Clapp that she needed to talk to somebody. (Tr. 239-240).

Thereafter, Clapp's husband picked her up at work and they spoke about contacting her former supervisor, Bob Brill, then retired. (Tr. 240). Clapp decided to visit Brill at his home because she was concerned about the way workers were treated by Robinson and Fischer, who

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[39] I do not credit this testimony from Respondent's witnesses that they decided to give Clapp a written letter of discipline demoting her to a level 5 shovel operator. I note that no letter of discipline was ever introduced into evidence and no explanation for failure to do so was provided. Respondent had already sent Clapp home for the day. Moreover, it is reasonable to assume that Respondent would have prepared a disciplinary letter to give Clapp the next day if Respondent had truly decided on demoting her. Furthermore, the reasons that Babcock gave for the purported demotion were part of the *res gestae* of Clapp's protected activity as found in my analysis below, and they were the same reasons that Babcock relied on in explaining why Clapp was terminated for insubordination, which I have found to be pretextual, as further explained in my analysis below. Finally, as further discussed below, I find that Clapp was not insubordinate during the meeting, and that any intemperate remarks that she made were essentially provoked by Fischer and fell within the *res gestae* of her protected activity. Accordingly, there is no lawful basis for any remedial argument from Respondent that any reinstatement of Clapp should be to a Level 5 operator position. In any event, Respondent has not raised that argument before me.

were unapproachable, and she had safety concerns about the truck-dumping policy. (Tr. 241). Clapp told Brill that she felt it was unsafe to be turning trucks around down in coal and dumping loaded coal trucks by the shovel. She told Brill that Robinson and Fischer were aggressive and unapproachable and did not want miners to talk about safety. Clapp mentioned the incident when she pushed the truck off the highwall. Clapp asked whether she should talk to Vaccari because she was uncomfortable talking to HR. Brill advised Clapp to talk to Vaccari. (Tr. 241-42).

Clapp credibly testified that she could not sleep that evening after the meeting with Robinson, Fischer and Babcock. She was concerned that the whole atmosphere in the pit had changed when working with Robinson and Fischer. As Clapp put it, miners no longer wanted to talk to management and were afraid to raise safety concerns. Rather, they called her with their safety concerns, and when she raised such concerns, they were ignored or resulted in accusatory or threatening back-room meetings. (Tr. 242-43).

F. The Events of March 11, 2010

At about 5 a.m. on March 11, 2010, Clapp called Vaccari at home. Clapp told Vaccari that she had serious concerns about issues at the mine and asked to speak to him about them. Vaccari told Clapp that she could speak to him anytime. Accordingly, Clapp made an appointment to speak with Vaccari during her 7-day off period on Friday, March 12 at 8:30 a.m. Before hanging up, Clapp told Vaccari that she had been up all night because of her concerns and did not feel that she should come to work and she was going to take a floating holiday ("floater") for her shift that morning. (Tr. 244, 1090).[40] According to Clapp, Vaccari said, "I understand." Tr. 244. Vaccari confirmed making this remark and was aware of the fact that Clapp might assume that it constituted tacit approval form the mine manager to take the floater . (Tr. 1091, 1120-21).

After calling Vaccari, Clapp called Robinson and told him that she was taking a "floater." (Tr. 247). According to Clapp, Robinson was "dead quiet" at first, and then asked, "Are you sick?" (Tr. 247). Clapp said, "No, I am taking a floater," and the line went quiet again until Fisher picked up. Fischer asked what Clapp wanted, and Clapp said that she was taking a floater. According to Clapp, Fisher said, "You can't we got meetings." (Tr. 247). Clapp

[40] On direct examination, Clapp testified that floaters are holidays that can be taken off without advance notice, and that miners have 32 hours of floating holidays per annum, which can be taken in 8-hour increments. (Tr. 86). Clapp testified that she did not have to give advance warning that she was taking a floater, but called her supervisors to give them time to set up the board so that she could take a floater. (Tr. 246). On cross examination, however, Clapp admitted that she needed approval from her supervisor to take a floater. (Tr. 349). Clapp had never seen, and Respondent failed to introduce, any written policy on floaters. (Tr. 247).

responded that she did not know that, and she was taking a floater. According to Clapp's credible testimony, Fischer said, "Okay, fine," and hung up. (Tr. 247).

Respondent's witnesses offered a different version of these events and argue that Clapp was directly insubordinate when she took a floater and failed to report for a scheduled meeting. Vaccari testified that miners needed to request permission to take floaters, that floaters can be denied, and that Fischer was within his authority to refuse Clapp's request for a floater. (1092). Vaccari further testified that it is very unusual for a miner to ignore a supervisor's directive concerning a floater. (Tr. 1093). Colby and Fischer testified that they have never had an employee take a floater after being denied permission. (Tr. 679, 949). In fact, Colby considered Clapp's refusal to report on March 11 to be directly insubordinate because Respondent purportedly had a policy that supervision has to approve a floating holiday. (Tr. 679).

On cross examination, Clapp testified that she thought she had Fischer's permission to take the floater and that she did not know she had meetings. I credit this testimony from Clapp. Clapp also testified that she did not hear Babcock's statement during the March 10 meeting that they would finish up the conversation tomorrow and take it from there. (Tr. 350) I discredit Clapp's testimony that she did not hear Babcock's statement given the emotional nature of the meeting. I note that Clapp directly answered Babcock's ensuing question by acknowledging that her concerns must go through Robinson and Fischer. (Tr. 352) I credit Clapp's testimony, however, that she believed that she had Fischer's permission, albeit reluctant, to take a floater, and that no specific meeting was scheduled, just a continuation of the discussion when she reported for work. I note that Babcock's statement during the March 10 meeting was ambiguous. He told Clapp, "You can take the day. Think about it, and then come in tomorrow ready to go. We'll finish up the conversation tomorrow, and then, you know, and go from there." Vaccari's notes from his subsequent March 12 meeting with Clapp and Whitted, discussed below, confirm the fact that Clapp told him on March 12 that Fischer did not say that Clapp could not take a floater on March 11. Rather, Fischer said "OK goodbye." (Tr. 1096; R. Ex. 20). In addition, I find that Clapp already had obtained Vaccari's tacit approval to take a floater on March 11, given her emotional state.

I infer that Fischer realized that something needed to be done so that he could resolve outstanding issues with Clapp because she was not scheduled to return to work again until March 19. (Tr. 1050). Accordingly, when HR Director, Amy Clemetson, arrived at the mine that morning, Fischer told her that "we had a meeting set up that morning for 7:00 and that Cindy called in and told me she was taking the day off." According to Fischer, Clemetson said that she would give Clapp a call and tell her that she has to be in by 9 a.m. for the meeting. According to Fischer, Clemetson later followed up and told Fischer that she could not reach Clapp, but left a message. (Tr. 951).

According to Clemetson, Fischer told her "that Cindy had not shown up for a meeting that they had scheduled that morning, that she had called in and asked for a floater, and he told her that she needed to come out to her meeting. And she told him no, and he let her know that HR would call her." (Tr. 1135). As noted, however, I have credited Clapp's testimony, that

Fischer ended the conversation by saying "Okay, fine." (Tr. 247). As further noted, I have found that Clapp already had obtained Vaccari's tacit approval to take a floater.

Clemetson testified that she looked up Clapp's home number in Respondent's automated system. Clemetson then called Clapp at home at about 6:50 a.m. and left a message on Clapp's answering machine. Clemetson's message indicated that Clemetson was aware that Robinson and Fischer had a meeting scheduled with Clapp that morning, and directing Clapp to report to the mine site by 9 a.m. for the meeting and to call with any questions. (Tr. 1136, 1143). Babcock testified that he was present when Clemetson left the message. (Tr. 1047).

Clapp credibly testified that she checked her messages that day and did not receive a call or message from Clemetson or anyone else at the mine. (Tr. 247-48, 251).[41] Rather, after Clapp spoke with Fischer, she went to bed and slept the rest of the day. (Tr. 248).

Clemetson admitted that she had heard that Clapp never received her message to report to a meeting on March 11. On questioning from the undersigned, Clemetson could not recall when or from whom she heard this. (Tr. 1144-45).

After Clapp called for the floater on March 11, Robinson, Fischer, and Colby discussed a recommendation to terminate Clapp because they purportedly had decided that termination was their only option when Clapp did not show up for the meeting. (Tr. 789). Colby informed Fischer that Clapp had a meeting scheduled with Vaccari the next day and that Vaccari wanted to meet about Clapp later in the week. (Tr. 786, 955-57).

Vaccari testified that Clemetson made him aware that Clapp had missed the meeting scheduled to take place with Clapp on March 11, 2010. (Tr. 1093). Vaccari also testified that Fischer informed him sometime after Vaccari arrived on March 11, that Clapp had requested a floater and that Fischer said, "No, you need to be out here for a meeting." (Tr. 1091). Vaccari admitted telling Fischer that Clapp had called Vaccari early that morning, but could not recall the specifics of what he told Fischer. (Tr. 1091-92). When the undersigned asked Vaccari if he told Fischer that Clapp had told Vaccari that she was up all night and could not sleep and needed to take the day off, Vaccari obliquely testified as follows:

> She said she was going to take the day off. She did not ask him if she could take the day off. I said I understood, and told Gerald that after he'd already had a conversation with Cindy.

(Tr. 1092). As noted, when Vaccari spoke with Fisher, Vaccari had already given tacit approval to Clapp to take the floater.

[41] Clapp's husband was home from work that day. (Tr. 252).

On the afternoon of March 11, Vaccari, Clemetson, Babcock, Colby, Fischer and Robinson met to discuss the next step of the disciplinary process for Clapp. At that point, the participants learned, if they did not already know, that Clapp had called Vaccari earlier that morning and had made an appointment to meet with him the next day, Friday, March 12. (Tr. 1047-48). The group brought Vaccari up to speed on what happened that morning. (Tr. 1137). Vaccari decided that no disciplinary decision would be made on March 11, so soon after the heated meeting on March 10. Vaccari wanted to meet with Clapp on Friday, March 12, and let everyone take the weekend to think things over, before regrouping the following week. (Tr. 963, 1048, 1137).

G. Clapp and Whitted Concertedly Raise Safety Concerns During the March 12 Meeting With Vaccari

Towards the end of the day on March 11, Clapp and Michelle Whitted spoke to one another. Whitted agreed to go with Clapp to speak with Vaccari the next day. (Tr. 249-250, 592). They wanted to talk to Vaccari about the issues raised with safety representative Tompkins, including the fact that they were tired of being dragged into the back room and tired of being unable to talk about safety. (Tr. 250).

Whitted gave Clapp a ride to the meeting, which took place in Vaccari's office on March 12. (Tr. 253, 591-92). Before the meeting, Clapp had called Vaccari's office to let him know that Clapp and Whitted would be meeting in concert with Vaccari. (Tr. 252-53).

Vaccari perceived his role in the meeting as a passive listener who allowed the employees to vent over the problems they had, but not to resolve any issues. (Tr. 1094-95). Vaccari took contemporaneous notes to "capture the gist" of the concerted activity. (Tr. 1095).

Clapp started the meeting by telling Vaccari that his was the hardest thing that she has had to do at work because of the seriousness of her concerns. (Tr. 254; R. Ex. 20, p. 1). Clapp wasted little time before homing in on her prior, protected activity by reiterating her safety concerns about turning around loaded coal trucks in the slot and dumping them at the face, and questioning why Respondent was engaged in such procedure. (Tr. 254, R. Ex. 20).[42] Clapp told Vaccari that Robinson and Fischer were angry with her for expressing her safety concerns to Vaccari and Oistad after Robinson had told the crew that if they had a problem with the truck-dumping procedure to take it to Colin Marshall. (Tr. 254, 256). According to Clapp's credible

[42] Although Respondent argues on brief that Clapp voiced no concerns over dumping in the coal face, as shown in Vaccari's contemporaneous notes (Br. at 16), this is clearly not the case and I discredit Vaccari's denial to the contrary. (Tr. 1096). Moreover, Whitted corroborated Clapp's testimony and Vaccari's notes (R. Ex. 20, p. 1), both of which establish that Clapp raised the dumping at the face policy as a safety concern. (Tr. 579). When I asked Vaccari what his notes meant, he incredulously could not recall. (Tr. 1098).

testimony, Vaccari stated that he knew the trucks were not overloaded and he agreed with Clapp's observation that Respondent had experienced a lot of accidents at the beginning of winter. (Tr. 255).

Whitted and Clapp then focused the conversation on the safety incentive game and the fact that Robinson and Fischer discouraged and intimidated employees in back-room meetings from raising safety concerns. (Tr. 254, 256, 577-79). In fact, Vaccari's March 12 notes described the March 10 meeting with Clapp as an "Intimidation Mtg" in which an "extremely angry" Fischer allegedly told Clapp "you make me sick always talking safety" and using "safety to get her way." (R. Ex. 20, p. 1).

When Vaccari asked what they felt would solve their problems, Clapp opined that Fischer and Robinson needed sensitivity training on how to treat and get along with co-workers, and Whitted opined that Clapp was too nice and Fischer and Robinson should be fired. (Tr. 256). At the end of the meeting, Clapp and Whitted expressed how uncomfortable they felt expressing such serious concerns to Vaccari. Vaccari offered the platitude, "We can keep it in the family." (Tr. 257-258).[43]

H. The March 17, 2010 Termination Decision

Vaccari, Clemetson, Colby, Babcock, Fischer and Robinson met on March 17 and decided to recommend Clapp's termination for insubordination.[44] (Tr. 679, 785, 959, 1050-51, 1105-06, 1137-38). Vaccari told the "family" about Clapp's [and Whitted's] complaints. (Tr. 959, 966, 1101-02, 1105-06).

Robinson and Colby recommended termination for insubordination because Clapp purportedly refused to come to work for the meeting on March 11. (Tr. 709, 728, 788). In fact, on cross examination, Colby, who signed the March 18, 2010 discharge letter (R. Ex. 1), limited the discharge to this justification. (Tr. 724-25). Fischer confirmed that Clapp was terminated for the alleged insubordinate act of not showing up for the meeting. (Tr. 967).

Babcock, by contrast, recommended termination for insubordination because Clapp attempted to send trucks to the hopper that were overloaded, challenged Robinson over the radio regarding the truck-dumping procedure, went to another supervisor with her concerns, failed to

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[43] Vaccari impressed me as a paternalistic, grandfather-like figure, who tried to appease everyone, but ultimately was going to back up his management team rather than take on the difficult issue that communication about safety issues had broken down on Fischer's crew and Fischer's and Robinson's supervisory style had contributed to the problem.

[44] Vaccari, HR and Colby made the actual decision (Tr. 1142), and a corporate compliance committee comprised of the chief legal counsel, vice president of HR, chief operating officer, and CEO ultimately reviewed and failed to challenge the termination decision. (Tr. 1107-1108, 1141).

acknowledge that Robinson and Fischer were her supervisors during the March 10 meeting, and failed to post for the March 11 meeting that Babcock purportedly had scheduled. (Tr. 1051).

HR Director Clemetson supported the recommendation for termination because Clapp allegedly disregarded the instructions of her supervisor to dump overloaded coal trucks back at the face. (Tr. 1139-40) She explained:

> .... For me, when plans are made and set, it's the expectation that employees are going to follow it, especially after it has been communicated. And having an employee just go out and do what they wanted or change that plan, it was causing – in my opinion, was a safety risk to that employee as well as the others around them.

(*Id.*) In addition, Clemetson noted that Clapp continued to show disrepect or disregard for the instructions of her supervisor by failing to show up for the March 11 meeting. (Tr. 1140).

Vaccari recommended termination for insubordination based on Clapp's full record because Clapp allegedly refused to listen to her supervisor and failed to show up for the March 11 meeting. (Tr. 1106-07). As Fischer put it, Vaccari said, "I'm in agreement with you all and I support my leadership team in the decision." (Tr. 965).

I. The March 18, 2010 Termination of Clapp and Subsequent Retaliation Against Whitted

Clapp was not scheduled to return to work on the D Crew until March 19. (Tr. 257). On March 18, 2010, Clemetson called Clapp and left a message on her answering machine. Clapp received the message informing Clapp that Clemetson, Colby and Fischer wanted to meet with her at 3 p.m. in the corporate office and to call back to confirm that she received the message. (Tr. 258, 1141-42). Clapp called Clemetson back and left a message confirming that she would be at the March 18 meeting. (Tr. 258).

Clapp arrived at corporate on March 18 with a large thermos of coffee. Clemetson escorted her to the meeting room where Colby and Fischer were present. Clemetson handed Clapp a termination letter (R. Ex. 1), signed by Colby, and said Cindy you are terminated. (Tr. 258). The termination letter stated that although Clapp's employment was at will, "[t]he reason for this termination is due to your insubordination towards leadership and for other legitimate business reasons." (R. Ex. 1). Clapp testified that she read the letter, said nothing, and left. (Tr. 258-59). Clemetson asked if Clapp had any questions and Clapp said no. Clemetson told Clapp to give her a call to arrange to pick up her belongings at the mine site. (Tr. 1145). Clapp credibly testified that she was totally shocked by the termination. (Tr. 259).

The evening of March 18, Clapp called Whitted. Clapp told Whitted that Clapp had been fired and that she was scared for Whitted and wanted her to be prepared. (Tr. 580).

On March 19, Whitted "was pulled into a meeting in the back office" with Fischer, Robinson, and Cliff Oedekoven (step-up utility lead), and told that Respondent was taking Whitted's crew training position away, that they no longer had a working relationship, and that she was lying about the safety incentive game's near-miss cards. (Tr. 580, 594). Whitted was in tears and told them that she was thankful that she still had her job because she was scared that she would lose it. (Tr. 580).

III. Legal Analysis

A. The Mine Act and its Legislative History

Congress declared in Section 2(a) of the Federal Mine Safety and Health Act of 1977 that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." Accordingly, the Mine Act includes strong anti-retaliation provisions to encourage miners to become more involved in voicing concerns about mine safety. According to Congress, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181 (1977).

Section 105(c)(1) of the Mine Act is the source of these protections. Section 105(c)(1) provides as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment

> on behalf of himself or others of any statutory right afforded by this Act.
> 30 C.F.R. § 815(c)(1).

Thus, miners receive protection against various types of discrimination in Section 105(c)(1) for engaging in the protected activity of voicing concerns about mine health and safety issues. In passing the Mine Health and Safety Act of 1977, Congress expanded protections for miners based on the belief that the miners' willingness to assist in observing and reporting issues of mine safety to their supervisors was a vital component in the effort to improve mine health and safety standards overall. The legislative history shows Congress's concern for encouraging miners to step forward and advocate for their safety, without fear of reprisal. In its attempt to achieve this goal, Congress enacted a provision that broadly interpreted the definition of protected activity. Specifically, "the Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints . . . but also the refusal to work in conditions which are believed to be unsafe or unhealthful" as well as "the refusal to work in conditions which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act."[45]

Furthermore, the legislative history of the Mine Act indicates that Congress wanted to prohibit forms of discrimination that were not always the most obvious and to "protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal."[46] These protections were designed to encourage miners to become actively involved in advocating for improved safety and health standards.

B. Legal Principles

A complainant alleging discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c), establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that 1) the individual engaged in protected activity, and 2) that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).[47] In determining whether a mine operator's adverse action was motivated by protected activity, the Commission

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[45] S. Rep. No. 95-181 (1977).

[46] *Id*.

[47] The Commission's recent decision in *Turner v. National Cement Co.* discusses the level of proof necessary to support a miner's prima facie discrimination claim. 33 FMSHRC 1059, 1065-72 (May 2011).

has noted that a judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp*., 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds sub nom*. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." 3 FMSHRC at 2510 (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510-12.

Once a prima facie case is established by a preponderance of the evidence, the operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Apart from actual discharge or discipline, the Commission explained in *Moses v. Whitley Development Corp*., 4 FMSHRC 1475, 1479 (1982), that coercive interrogation and harassment over the exercise of protected rights is prohibited by § 105(c)(1) of the Mine Act. In fact, section 105(c)(1) states that "no person shall discharge or in any manner discriminate against... or *otherwise interfere with* the exercise of the statutory right of any miner." (italics added.) In *Moses*, the Commission was guided by the legislative history of the Mine Act, which referred to "the more subtle forms of interference, such as promises of benefit or threats of reprisal." *Moses, supra,* at 1478, citing Legislative History at 624. The Commission observed that a "natural result" of such subtle forms of interference "may be to instill in the minds of employees fear of reprisal or discrimination." *Moses, supra*, at 1478. As the D.C. Circuit observed in *Phillips v. Interior Board of Mine Operators Appeals*, 500 F.2d 772, 778 (D.C. Cir. 1974), "safety costs money" and "miners who insist on health and safety rules being followed, even at the cost of slowing down production, are not likely to be popular with mine foreman or top management."

Moreover, in a number of cases, the Commission has looked for guidance to case law interpreting similar provisions of the NLRA, as well as Title VII and other employment statutes, to resolve questions concerning the proper construction of provisions of the Mine Act. *See Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 206 (Feb. 1994) (standard for showing facial discrimination); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990) (legality of operator's policy of paying employees who testify as witnesses on its behalf, but not paying employee for time spent testifying as another party's witness); *Local Union 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493, 1501 n.6, 1504-05 (Nov. 1988) (appropriate rate of interest on backpay awards), *aff'd sub nom. Clinchfield Coal Co*. v. FMSHRC, 895 F.2d 773 (D.C. Cir. 1990); *Metric Constructors, Inc.*, 6 FMSHRC 226, 231-33 (Feb. 1984) (mitigation

defense to backpay award), *aff'd*, 766 F.2d 469 (11th Cir. 1985). In *Delisio*, the Commission noted that it "has recognized in several contexts that . . . cases decided under the NLRA -- upon which much of the Mine Act's anti-retaliation provisions are modeled -- provide guidance on resolution of discrimination issues under the Mine Act." 12 FMSHRC at 2542-43 (citing *Metric Constructors,* 6 FMSHRC at 231). Applying a similar rationale below, I conclude that case law applying unlawful interference principles as evidence of animus under Section 8(a)(1) of the NLRA may be considered for guidance in interpreting comparable provisions of the Mine Act dealing with unlawful interference.

B. The Secretary's Prima Facie Case of Discrimination Against Clapp

1. Protected Activity

The record is replete with Clapp's ongoing protected activity of making safety complaints to Cordero, including Robinson, Fischer, Vaccari, and the safety department, before Cordero terminated her employment on March 18, 2010. In November 2008, Clapp spoke with Robinson and Fischer about sending a pickup for the crew with insufficient seatbelts. (Tr. 623-24, 1066). Clapp then spoke with Vacarri about the incident. (Tr. 1066). During Clapp's explanation, Vaccari uncovered the seat belt violation. (Tr. 373-74, 1066). Vaccari told Fischer about the issue for follow up. (Tr. 1067).

About early February 2009, Clapp complained to Robinson and Fischer about monitor screen placement impairing visibility in rubber tire dozers. (Tr. 125). In response to these concerns, Fischer retorted, "We're not moving them screens. We are using them screens, get used to it." (Tr. 124). On February 22, 2009, Clapp completed a pre-shift report for the 325 rubber tire dozer and noted that the screen blocked her vision and she would have shut the machine down if she was the regular operator. (Tr. 127, G. Ex. 15, p. 1). Robinson told Clapp, "[R]espondent won't be moving them screens." (Tr. 127).

On March 1, 2009, Clapp made similar impaired-visibility complaints on the pre-shift form for the 328 rubber tire dozer. (Tr. 128, G. Ex. 15, p. 2). On March 21, 2009, Clapp made similar impaired-visibility complaints on the pre-shift report for the 103 shovel (Tr. 134; G. Ex. 16, p. 1), and asked Fischer and Robinson to have maintenance fix the problem. (Tr. 136, 138) Her complaint made its way to Colby's desk. (Tr. 794). Clapp followed up on the issue a couple of months later and was told by Fischer and Robinson that they were not going to move the screen. (Tr. 138).

About March or April 2009, Clapp complained to Fischer and Robinson in safety meetings, in private discussion, and by radio, about rubber tire dozers that had been parked and left unmanned behind her shovel while the RTD operator ran other equipment, such as the blade. (Tr. 97-99). Fischer and Robinson told her they did not care what her concerns were, that it was not unsafe to park the unmanned dozer behind the shovel. (Tr. 99). At the hearing, Clapp identified a litany of reasons why the practice was unsafe, including entrapment upon spoil

failure. (Tr. 100-01). I find that Clapp established the good faith and reasonableness of her subjective belief that a hazard existed. *Cf., Robinette,* 3 FMSHRC at 807-12; *Secretary on behalf of Bush v. Union Carbide Corp.,* 5 FMSHRC 993. Moreover, I find that Clapp's perception of the hazards was objectively reasonable and not so groundless or irrational as to fail even a more stringent objective test. *Cf. Asarco, Inc*., 18 FMSHRC 317, 325 (Mar. 1996) (ALJ Manning).

On July 13, 2009, Clapp moved the MMC screen that was blocking her vision in the 103 shovel, but left the screen operational so that she could hear communications from dispatch. (Tr. 140-142, 794; G. Ex. 16, p. 2). According to Clapp's credible testimony, when Fischer arrived, he immediately started yelling at her, noting that the screen was a $20,000 piece of equipment that could not be moved. When Fischer put the screen back in the window of the shovel, Clapp said, "I'm safer than you Gerald. I'm safer than you. I have got to have vision in my shovel. I need to see. I'm responsible down here for not injuring anybody. I have to have my vision." (Tr. 145). Clapp credibly testified that Fischer became furious and yelled at her loudly, "You are not safer than me." As Fischer adjusted the screen, he yelled, "It doesn't bother me, it doesn't bother me at all. It doesn't bother anybody but you. Bend over and look under it." (Tr. 146-47). I find that Clapp's remarks were part of the *res gestae* of protected activity.

During the subsequent back-door meeting in Fischer's office, I find that Fischer interfered with Clapp's statutory rights by telling her that could make her work in uncomfortable situations (such as placing her in a track dozer at the top of a highwall) even if she thought it was unsafe. (Tr. 149-50) The Commission has recognized that there are situations in which the response of a supervisor to a miner's protected complaint may constitute interference with the exercise of the miner's right to complain. *See Moses v. Whitley Development Corporation,* 4 FMSHRC 1475, 1478-1479 (Aug. 1982), *aff'd* 770 F. 2d 168 (3rd Cir. 1981). The question of whether a management official's response constitutes interference proscribed by the Act must be determined by what is said and done and the totality of circumstances surrounding the words and actions. *Secretary on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1, 8 (Jan. 2005) (*quoting Moses*, at 1479, n.8). In essence, the test for unlawful interference is whether the employer engaged in conduct that has a reasonable tendency to interfere with the free exercise of employee rights under the Act. *Cf. NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1966). Threats directed to a miner for exercising a protected safety-complaint right constitute discrimination and unlawful interference under § 105(c) of the Act. *Secretary on behalf of Johnson v. Jim Walker Resources,* 15 FMSHRC 2367, 2377 No. 1993) (Judge Fauver), *citing Denu v. Amax Coal Company*, 11 FMSHRC 317, 322 (1989), (Judge Melick); *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1479 (1982); and *Secretary on behalf of Carson v. Jim Walter Resources, Inc.,* 15 FMSHRC 1993, 1996-1997 (1993) (Judge Maurer). Although the Secretary did not plead Fischer's remark as interference and a substantive complaint allegation, it is background evidence of animus.

I find that Clapp also engaged in protected activity when she told Fischer that she will never do anything unsafe like that and that she would park the dozer and wait for Fischer to come get her. (Tr. 149). I find that Clapp engaged in further protected activity when she told

Fischer and Robinson that she needed vision for her safety and the safety of others on her coal run.

Also during the summer of 2009, Miller heard Clapp call Robinson and Fischer over the radio and asked for a water truck because of dusty conditions in the pit. Miller credibly testified that Robinson then turned to Fischer and said, "I don't care how many times she calls she is not getting a water truck." (Tr. 521). I find that Robinson's statement interfered with Clapp's statutory right to request water and had a reasonable tendency to coerce Miller who overheard it. *Cf. Simpson Electric Co*., 250 NLRB 309 (1980). Robinson conveyed the message to Miller that it was futile for Clapp to request water because it would not be provided. Under all the circumstances, I conclude that Robinson's statement would reasonably tend to interfere with a miner's exercise of rights guaranteed by the Act.

Clapp engaged in further protected activity throughout 2009, and more often in the winter months of late 2009 and early 2010, when she called Robinson and Fischer several times to request water because of dusty conditions in the pit, but her requests were ignored. (Tr. 108-09, 116). Clapp also called Fischer and Robinson during this time frame on behalf of several truck drivers on her crew because their requests for water were also ignored and they, unlike Clapp, chose not to risk angering Fischer or Robinson by continuing to call for water. (Tr. 112-115). On two occasions during this time frame, Clapp called Fischer and Robinson to inform them that she was shutting down the run because neither she nor the truck drivers could see with the pit engulfed in dust. (Tr. 109-10). I have credited Clapp's testimony that once she engaged in the work refusals and shut down the run, Fischer and Robinson immediately sent water. (Tr. 110).

In January 2010, just two months before her discharge, Clapp engaged in protected activity when she told safety department head Andrews, that she was having problems when she asked for a water truck and needed his help. (Tr. 111). Clapp was then serviced by a water truck during day-shift rotation when the safety department was present, but continued to have problems on nights and weekends when no one from safety was on-site. (Tr. 111-12).

Also in January 2010, Clapp spoke with safety representative McLaughlin and raised ongoing safety concerns about unmanned rubber tire dozers parked behind her shovel. (Tr. 103-04). Clapp also informed McLaughlin that she thought the practice had become deliberate after she raised her safety concerns with Fischer and Robinson earlier in the year. According to Clapp, this allegation troubled McLaughlin, who asked for time to think about how to handle it. (Tr. 104). Thereafter, the rubber tire dozer was not parked unmanned behind Clapp's shovel during day shifts when the safety department was present. But the practice continued on nights and weekends. (Tr. 104-105).

In early March 2010, shortly before her discharge, Clapp repeatedly engaged in protected activity when she raised safety concerns about turning around and dumping overloaded coal trucks back at the coal face. For example, on the evening of March 2, when the governor was triggered in Young's truck, Clapp called Robinson, who directed her to have the truck turned

around and dumped in the coal face. Clapp told Robinson that it was "stupid and unsafe" to do so, but she complied with his directive and had Young dump his truck back at the face. (Tr. 172, 177; R. Ex. 18). Fischer admitted at the March 10, 2010 meeting that he condoned Clapp's remarks on this occasion. (G. Ex. 17A, p. 48). Robinson's own notes confirm Clapp's protected activity on this occasion when she told Robinson that it was unsafe "dumping trucks at the face as they would have to turn the truck around in the traffic in the slot and back it under the shovel which she thought was dangerous." (R. Ex. 18).

At the end of the shift on March 2-3, 2010, Clapp engaged in further protected activity when she conveyed her safety concerns about the truck-dumping procedure to mine manager Vaccari in the hallway. (Tr. 181-82). Clapp told Vaccari that she thought it was unsafe to turn around and dump loaded coal trucks in the uneven pit. (Tr. 182-83, 1115). Clapp saw Robinson and then Fischer give her angry looks behind Vaccari's back. (Tr. 185-86). Thereafter, Vaccari discussed ways to address Clapp's concerns with Robinson and Fischer. (Tr. 1119).

Clapp engaged in further protected activity when she called ROS Oistad on March 3 to express her concerns about the truck dumping procedure. Clapp told supervisor Oistad that she was afraid to turn around trucks and have them raise their beds and dump coal down in the congested coal slot, particularly in light of recent truck accidents that had occurred at the mine in late winter and early spring. Clapp told Oistad that she felt that Respondent was pushing the line on safety by taking risks that were unnecessary. (Tr. 189, 1023-24). Oistad conceded in his testimony that Clapp raised safety concerns regarding congestion in the slot (Tr. 1023-24), and told Fischer and Robinson that Clapp had called him to express her concerns about the truck-dumping policy. (Tr. 773-74, 919-20).

On March 9, Clapp engaged in protected activity when she told driver Clark over the line-of-sight channel, which Robinson and Fischer were monitoring, that Clark was going to have to dump her truck back at the face because nothing has changed, and Vaccari had not gotten back to her about her safety concerns. (Tr. 192-95). Clapp's remarks provoked Fischer's outburst that he did not care what Vaccari said, that this was Fischer's policy, so turn that truck around and dump it. (Tr. 193). Clapp complied with Fischer's decision to dump Clark's truck. (Tr. 193).

During the heated meeting on March 10, Clapp engaged in protected activity when she told Fischer, Robinson and Babcock that she had a right to call Oistad, Vaccari, and the safety department with her safety concerns about turning loaded coal trucks around and dumping "in the middle of the night in the dark down in black coal," which she felt was stupid and very dangerous. (G. Ex. 17, G. Ex. 17A, pp. 3-6, 24-27, 29-40, 46-47). In fact, Robinson acknowledged at the meeting and at the hearing that Clapp "pulled a safety trump on me, said it was unsafe to dump them at the face on the radio." (G. Ex. 17A, p. 53, p. 17; and Tr. 827-28) Robinson's own notes state ". . . I then reminded her of last week when she had to dump 271 and she had argued with me over channel three and pulled a safety trump on me by saying over the radio that it was an unsafe practice. I then told her that since she disagreed with me, she had raised the issue with both Terry Oistad and Joe Vaccari . . . . " (R.Ex. 18, lines 6-9).

Clapp engaged in further protected activity when she returned to the safety department after the meeting with Robinson, Fischer and Babcock on March 10 and was advised by Tompkins to talk to HR or Vaccari about her ongoing safety and communication conerns. (Tr. 239-240). Clapp engaged in further protected activity when she called Vaccari on March 11, told him that she had been up all night because of serious concerns about issues at the mine, and arranged a meeting with him to discuss her concerns. (Tr. 244, 1090). Since Babcock briefed Vaccari on March 10 about what occurred during that day's meeting with Clapp (Tr. 1087), I infer that Vaccari knew that Clapp wanted to reiterate her previously expressed safety and communication concerns about Fischer's truck-dumping policy.

Finally, Clapp engaged in protected activity when she and Whitted met with Vaccari on March 12 about the issues raised with safety representative Tompkins, including the fact that they were tired of being "dragged" into the back room and tired of being unable to talk about safety. (Tr. 250). Clapp's testimony and Vaccari's notes confirm that Clapp homed in on her prior protected activity by reiterating her safety concerns about turning around loaded coal trucks in the slot and dumping them at the face and questioning why Respondent was engaged in such a procedure. (Tr. 254, R. Ex. 20). Clapp told Vaccari that Robinson and Fischer were angry with her for expressing her safety concerns to Vaccari and Oistad after Robinson had told the crew that if they had a problem with the truck-dumping procedure take it to Colin Marshall. (Tr. 254, 256). Clapp and Whitted also discussed the safety incentive game and the fact that Robinson and Fischer discouraged and intimidated employees in back-room meetings from raising safety concerns. (Tr. 254, 256, 577-79). In fact, Vaccari's notes described the March 10 meeting with Clapp as an "Intimidation Mtg" in which an "extremely angry" Fischer allegedly told Clapp "you make me sick always talking safety" and using "safety to get her way." (R. Ex. 20, p. 1).

On this record, there can be no doubt that Clapp engaged in ongoing, extensive, protected activity for herself and on behalf of other miners when she made repeated safety complaints to Cordero management and the safety department.

B. Adverse Action

Vaccari, Clemetson, Colby, Babcock, Fischer and Robinson met on March 17 and decided to recommend Clapp's termination for alleged insubordination. (Tr. 679, 785, 959, 1050-51, 1105-06, 1137-38). Vaccari told the group about Clapp's [and Whitted's] complaints. (Tr. 959, 966, 1101-02, 1105-06). It is undisputed that on March 18, 2010, Cordero terminated Clapp's employment at the Cordero mine.

When Clapp arrived at the corporate office on March 18, Clemetson escorted her to the meeting room where Colby and Fischer were present, handed her a termination letter (R. Ex. 1) signed by Colby, and told her she was terminated. (Tr. 258) Clearly, Cordero took adverse action against Clapp by discharging her after 28 years of service.

C. Motivation

In *Chacon*, as recently reaffirmed in *Turner*, the Commission reiterated the well-established principle that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Turner*, 33 FMSHRC, slip op. at 9, citing *Chacon*, 3 FMSHRC at 2510. Consideration of indirect evidence involves the drawing of reasonable inferences from the facts of record, and circumstantial evidence and reasonable inferences drawn from it may be used to sustain a prima facie case. *Turner,* 33 FMSHRC, slip op. at 9, citing *Bradley v. Belva Coal Co*., 4 FMSHRC 982, 992 (June 1982), citing *Chacon*, 3 FMSHRC at 2510-12.

The record contains ample reliable evidence to support a conclusion that Cordero's termination of Clapp was motivated by her protected activity. In reaching this conclusion, I rely primarily on the following indicia of Cordero's discriminatory intent: (1) Cordero's knowledge of Clapp's protected activity; (2) the animus demonstrated by Cordero, and particularly her immediate supervisor Fischer, towards Clapp's protected activity; (3) the very close proximity in time between Clapp's most recent protected activity involving safety complaints related to the truck-dumping policy and Cordero's adverse action; (4) and disparate treatment of Clapp.

1. Knowledge

The Commission has held that an "operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case," and that "knowledge . . . can be proved by circumstantial evidence and reasonable inferences." *Chacon*, 3 FMSHRC at 2510. Here, however, I need not resort to any circumstantial evidence or inferences to find that Cordero knew of Clapp's protected activity. As outlined above, Cordero supervisors, managers, and/or HR personnel involved in the termination decision had direct knowledge of Clapp's ongoing protected activity, and most particularly, her safety complaints about Fischer's truck-dumping policy on March 2, 3, 9, 10, and 12. In addition, when Vaccari, Clemetson, Colby, Babcock, Fischer and Robinson met on March 17 and each decided to recommend Clapp's termination for insubordination (Tr. 679, 785, 959, 1050-51, 1105-06, 1137-38), Vaccari told the group about Clapp's and Whitted's March 11 complaints (Tr. 959, 966, 1101-02, 1105-06), which included Clapp's reiteration of her March 3, 9, and 10 safety concerns about turning around and dumping loaded coal trucks back at the face, the fact that miners on the D crew were afraid to raise safety issues with Robinson and Fischer, and the fact that Fischer was angry with Clapp for discussing her safety concerns with Vaccari and Oistad. (Tr. 254-56, 577-79).

2. Animus

Animus is but one of several indicia of discriminatory intent. *Turner,* 33 FMSHRC, slip op. at 12, n. 9. I find ample, reliable evidence of strong and continuing animus that Cordero management, and particularly Fischer, exhibited towards Clapp's protected activity. In fact, the record contains overwhelming evidence that Clapp repeatedly raised safety concerns to Fischer and Robinson, and then to mine manager Vaccari and the safety department, based on the non-responsiveness of her immediate supervisors, and that Fischer demonstrated extreme and ongoing hostility toward Clapp's protected activity, especially the fact that Clapp went to Vaccari with her safety concerns.

Back in November 2008, Clapp spoke with Vaccari about the fact that Robinson and Fischer sent a pickup for the crew with insufficient seatbelts. (Tr. 623-24, 1066). Vaccari asked Fisher to follow up on the issue. (Tr. 1067) Later that day, Halverson overheard Fischer discuss his follow-up after leaving Vaccari's office: "That bitch, we'll show her who's boss. How dare her go over our heads. I can't believe she did this and said anything to Joe." (Tr. 612; cf. 625). I have drawn the inference that Fischer's animus was directed at Clapp, who brought the issue to Vaccari's attention. Thereafter, Fischer issued Clapp a last and final warning for failing to wear a seat belt (R. Ex. 4), but Clapp was the first miner to whom the automatic last and final policy was applied, there was no written documentation confirming the policy, it apparently was not enforced by Fischer against miner Lang, and Clapp's warning followed closely on the heels of Fischer's animus toward Clapp for bringing the issue to Vaccari's attention, after Robinson and Fischer could not resolve Clapp's concerns.

In February and March 2009, Clapp and two other miners raised safety concerns concerning impaired visibility regarding the placement of large monitor screens in RTDs. (Tr. 116-25, 134-38, G. Ex. 15-16). Fischer and Robinson responded they were not going to move the screens so "get used to it." (Tr. 124, 127, 132). About March or April 2009, Clapp complained to Fischer and Robinson in safety meetings, in private discussion, and by radio, about rubber tire dozers that had been parked and left unmanned behind her shovel while the RTD operator ran other equipment, such as the blade. (Tr. 97-99). Fischer and Robinson told her they did not care what her concerns were, that it was not unsafe to park the unmanned dozer behind the shovel. (Tr. 99).

On July 13, 2009, after Clapp moved the MMC screen that was blocking her vision in the 103 shovel, Fischer yelled at her that the screen was a $20,000 piece of equipment that could not be moved. When Fischer put the screen back in the window of the shovel, Clapp said, "I'm safer than you Gerald. I'm safer than you. I have got to have vision in my shovel. I need to see. I'm responsible down here for not injuring anybody. I have to have my vision." (Tr. 145). Fischer became furious and yelled, "You are not safer than me . . . . It doesn't bother me, it doesn't bother me at all. It doesn't bother anybody but you. Bend over and look under it." (Tr. 146-47). I have found that Clapp's remarks were part of the *res gestae* of protected activity.

During the subsequent closed-door meeting in Fischer's office, Fischer interfered with Clapp's statutory rights by telling her that could make her work in uncomfortable situations (such as placing her in a track dozer at the top of a highwall) even if she thought it was unsafe. (Tr. 149-50). I have found that Fischer's statement was a threat directed at Clapp for exercising her protected safety-complaint rights. See *Secretary on behalf of Johnson v. Jim Walker Resources,* 15 FMSHRC 2367, 2377 No. 1993) (Judge Fauver), *citing Denu v. Amax Coal Company*, 11 FMSHRC 317, 322 (1989), (Judge Melick); *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1479 (1982); and *Secretary on behalf of Carson v. Jim Walter Resources, Inc.,* 15 FMSHRC 1993, 1996-1997 (1993) (Judge Maurer). I have further found that such interference under § 105(c) of the Act may be used as background evidence of animus, since not pled as a substantive complaint allegation. Similarly, during the same meeting, I have found that Robinson interfered with Clapp's right to make safety complaints to Vaccari by telling her that she made them look stupid because she goes behind their back and always uses the "safety

trump" to get her way. (Tr. 149). Under *Moses*, supra, such a statement has a reasonable tendency to interfere with Clapp's right to go to mine manager Vaccari with her safety complaint and to raise safety complaints that she believes in good faith are warranted. Thus, I consider Robinson's remark as further background evidence of animus.

Further evidence of animus occurred in the summer of 2009, when Miller heard Clapp call Robinson and Fischer for water because of dusty conditions in the pit, while Miller sat in their lead pickup. Miller heard Robinson tell Fischer, "I don't care how many times she calls she is not getting a water truck." (Tr. 520-21). The record further reflects that throughout 2009, and more often in the winter months of late 2009 and early 2010, Fischer and Robinson repeatedly ignored Clapp's requests for water to control dusty conditions in the pit, forcing Clapp to shut down the coal run on two occasions. Other employees would go to Clapp with their concerns because they were afraid to call Fischer and Robinson for water. (Tr. 107-115) Once Clapp engaged in the work refusals and shut down the run, Fischer and Robinson immediately sent water. (Tr. 110).

A further inference of animus is drawn from events in January 2010, when Robinson and Fischer continued to dismiss Clapp's ongoing safety concerns about unmanned rubber tire dozers parked behind her shovel. After Clapp spoke with safety representative McLaughlin and told him that she thought the practice had become deliberate because Clapp had raised her safety concerns with Fischer and Robinson earlier in the year, the rubber tire dozer was not parked unmanned behind Clapp's shovel during day shifts when the safety department was present, but the practice continued on nights and weekends. (Tr. 104-105). Similarly, in January 2010, Clapp also spoke with safety manager Andrews about problems she was having getting water and asked for his assistance. Thereafter, Clapp received water on day shifts when the safety department was present, but had difficulty on nights and weekends when safety was not on site. (Tr. 111-12).

Further evidence of ongoing animus toward Clapp's protected activity may be gleaned from the events in early and mid March 2010, shortly before Clapp's March 18 discharge. As explained above, Clapp repeatedly raised safety concerns about turning around and dumping overloaded coal trucks back at the face. When the policy was first announced during the pre-shift meeting the evening of March, Robinson pre-empted Clapp's unarticulated concerns by stating, "If you have a problem with it, take it to [CEO] Colin Marshall." (Tr. 160, 561-62, 564, 757, G. Ex. 17 and 17A p. 2-3). At the end of the next shift, after Clapp complied with Robinson's directive to dump Young's truck back at the face and Clapp told Robinson that it was stupid and unsafe to turn loaded coal trucks around in the slot and dangerous to dump them back under the shovel (Tr. 172, 177; R. Ex. 18), Clapp told Vaccari that it was unsafe to turn around and dump loaded coal trucks in the uneven pit. (Tr. 182-83, 1115) Robinson and Fischer gave Clapp angry looks behind Vaccari's back. (Tr. 185-86). Thereafter, after Clapp also told supervisor Oistad that it was unsafe to turn around trucks and dump coal down in the congested slot, particularly in light of recent truck accidents (Tr. 189, 1023-24), and after Clapp told Clark over the line-of-site channel radio on March 9 that Clark was going to have to dump her truck back at the face because Vaccari had not gotten back to her about her safety concerns (Tr. 192-95), Fischer began screaming at Clapp over the radio that he did not care what Vaccari said

because it was his policy. (Tr. 193; cf. G. Ex. 17 and 17A, pp. 51). Fischer acknowledged that Clapp's remarks really angered him. "So that really chapped me. I don't know what Joe will come up with. I don't know what his policy is." (G. Ex. 17, G. Ex. 17A, pp. 51) As Fischer put it, "that was the straw that broke the camel's back," because it was Fischer's decision, not Vacarri's policy. (*Id.)*.

Shortly thereafter, at the end of the shift on March 10, Fischer and Robinson summoned Clapp into another lengthy, closed-door meeting in Fischer's office. Fischer told Clapp that he was angry that she had challenged the truck-dumping policy by throwing a fit over the radio and by undermining them through discussion of the issue with Vaccari and Oistad, activities that I have found protected. (Tr. 198, G. Ex. 17, G. Ex. 17A, pp. 2-10). Clapp tried to explain to Fischer the need to communicate her safety concerns to someone who would listen and not get so "pissed off" as to scream at her and threaten to make her work uncomfortable as Fischer did back on July 13, 2009. Fischer again told Clapp that he was not afraid to put her in an uncomfortable position. He further stated that she was not getting on board, that she "throws a lot of bullshit around," that "sometimes what comes out of your mouth is yuck," that he did not give a shit if Clapp had 28 years because Fischer valued safety also (G. Ex. 17A, pp. 11-15), and that Fischer did not give a shit what other crews were doing. (*Id*. at 250).

When HR representative Babcock eventually joined the meeting despite Clapp's requests for Vaccari (Tr. 775, 819; G. Ex. 17A, pp. 28 and 35), Clapp explained to Babcock that Robinson and Fischer were mad at her for communicating her safety concerns to Vaccari. (G. Ex. 17A, pp. 36-38). Babcock told her, "Well in this case the way the policy is set …. then you go with what the policy is …. If you are told that you need to turn a truck around, that it's overweight, then you do just that. And if the question is out there and it's being looked at, you just trust that the powers that be are looking at it. But until you get word of, you know, you don't have to do this anymore, continue with the policy as is." (*Id*. at 39). Babcock further told Clapp that she should not broadcast her concerns to her supervisors over the radio as it could be viewed as questioning authority. (*Id*. at 40-42).

Cordero management expressed further animus toward Clapp's protected activity when Fischer explained to Babcock that he was bothered by the fact that Clapp gave Robinson "a lot of feedback and flack on the radio," and really got his "dander up" when she asked Oistad what his crew was doing, and told Vaccari that she had to light load the trucks. (*Id*. at 46-49). Fischer further explained that "the straw that broke the camel's back" was the incident of March 9 when Clapp told Clark that Vaccari had not gotten back to her about the truck dumping policy. (*Id.* at 50-51). Robinson agreed with Fischer that as of March 9, Clapp still did not agree with the truck dumping policy and was intent on going to Vaccari, and that back on March 2, she "pulled a safety trump on me" by saying it was unsafe to dump at the face over the radio. (*Id.* at 52-53). When Clapp insisted to Fischer that she could talk to anybody she wanted concerning her safety concerns (*Id.* at 57), Fischer opined that Clapp had not learned a single thing during the meeting (*Id.* at 59), and Babcock admonished Clapp that questioning the policy over the radio and going outside the crew with her concerns was improper and undermined her supervisors' authority, which he expected her to follow. (*Id.* at 60-61). When Clapp indicated that she was communicating her safety concerns and not undermining authority, and that Cordero focused on

her for communicating her concerns when other crews were driving down the road and dumping at the hopper (*Id.* at 62-63), Babcock told Clapp that she needed to go through Robinson and Fischer with her safety concerns and they were sending her home with pay so she could come back the next day ready to go and finish up the conversation. (*Id.* at 67-68).

In these circumstances, Fischer, Robinson and even Babcock to a lesser extent were hostile to Clapp's protected activities and I find that Clapp worked in an environment in which her immediate supervisors were pervasively hostile to her safety complaints. Since Babcock briefed Vaccari on March 10 about what occurred during the March 10 meeting with Clapp (Tr. 1087), I have inferred that Vaccari knew that Clapp wanted to reiterate her previously expressed safety and communication concerns about Fischer's truck dumping policy when Clapp called Vaccari on March 11 to arrange a meeting with him on March 12, 2010. Moreover, Vaccari's notes of the March 12 meeting with Clapp (and Whitted) describe the March 10 meeting with Clapp as an "intimidation meeting in which an "extremely angry" Fischer allegedly told Clapp "you make me sick always talking safety" and using "safety to get her way." (R. Ex. 20, p. 1). As noted, Vaccari told Fischer and the rest of the management team about Clapp's [and Whitted's] complaints during the March 17 meeting to decide Clapp's fate. (Tr. 959, 966, 1101-02, 1105-06).

Based on the totality of record evidence, I find that Cordero's ultimate decision to terminate Clapp was based, in part, on Fischer's, Robinson's and Babcock's recommendations and hostility toward Clapp's ongoing protected activity, including that fact that even after the March 10 meeting, Clapp decided to again raise her safety concerns with Vaccari on March 12. Accordingly, I conclude that the ultimate decision to terminate Clapp was tainted by retaliatory animus for protected activity.

3. Temporal Proximity

As outlined above, Clapp's most recent protected activity concerning her safety complaints over the truck-dumping policy occurred on March 2, 3, 9, 10, and 12. Cordero terminated Clapp's employment during her week off on March 18. (Tr. 258; R. Ex. 1). Clearly, there is a significant coincidence in time between Clapp's most recent protected activity, specifically her March complaints about the truck-dumping policy to Robinson, Fischer, Babcock, Oistad, Vaccari and the safety department, and the adverse action that Cordero executed by discharging her on March 18, before she returned to work on her next scheduled shift. See *Sec'y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009) (finding "proximity in time" where the time between the protected activity and adverse action was three weeks); *cf., Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 37-38, 43-44 (Jan. 1999) (finding temporal proximity despite 16-month gap between protected activity and adverse action). The fact that Cordero's adverse action against Clapp so closely followed her most recent protected activity is itself evidence of an illicit motive. *See, e.g., Turner,* 33 FMSHRC, slip op. at 13, citing, *Donovan v. Stafford Constr. Co.,* 732 F.2d 954, 960 (D.C. Cir. 1984) (two weeks between alleged protected activity and miner's discharge is "itself evidence of illicit motive").

4. Disparate Treatment

Although the evidence of disparate treatment is somewhat equivocal given Clapp's disciplinary history, as set forth in section II, B, 4, B, *supra*, I have found sufficient probative evidence to warrant the inference that Clapp was disciplined more harshly prior to her discharge than Christiansen and Eisenhauer because of Clapp's ongoing safety complaints. Furthermore, with regard to Cordero's affirmative defense that it would have disciplined Clapp for her alleged insubordination alone, I note that Eisenhauer told Robinson not to tell him what to do prior to damaging the dozer on June 13, 2009, and Eisenhuaer was not written up for insubordination. Finally, the evidence indicates, as Clapp explained to management during the heated March 10 meeting, that Fischer and Cordero were focused on Clapp in enforcing the truck-dumping policy. (see G. Ex. 17A, p. 62). I have found that D-crew driver Artz confirmed that he had taken an overloaded haul truck to the hopper, that management was aware of it through the MMC system, and that Cordero did not discipline Artz for his actual refusal to follow instructions. (Tr. 422-23). Similarly, Whitted credibly testified that Robinson was aware that Young took an overloaded truck to the hopper and Respondent introduced no evidence that Young received any discipline for the failure to follow Robinson's instructions to dump back at the face. (Tr. 581-83). Moreover, Oistad's crew sent overloaded trucks to the hopper when conditions in the pit were not favorable for dumping. (Tr. 190).

D. Prima Facie Case

In light of my findings above that Clapp engaged in protected activity, that Cordero terminated her, and that her discharge was motivated by her protected activities, I conclude that the Secretary established a strong prima facie case of unlawful discrimination under the Mine Act. Accordingly, I reaffirm my denial of Cordero's motion to dismiss made at the end of the Secretary's case. (Tr. 628).

E. Cordero's Affirmative Defense

An operator may rebut a prima facie case of prohibited discrimination by showing either that no protected activity occurred, or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n.20. Given my findings above, Cordero has failed to rebut the prima facie case.

Although Cordero cannot rebut the Secretary's prima facie case, it may nevertheless defend affirmatively by proving that it also was motivated by Clapp's unprotected activity and that it would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

The Commission has explained that a defense should not be examined superficially or approved automatically once proffered. *Turner,* 33 FMSHRC, slip op. at 15, *citing Haro v. Magma Copper Co*., 4 FMSHRC 1935, 1938 (Nov. 1982). Rather, in reviewing an affirmative defense, judges must determine whether it is credible and, if so, whether it would have motivated the particular operator, as claimed. *Id*., *citing Bradley*, 4 FMSHRC at 993. Pretext may be found where the asserted justification is weak, implausible, or out of line with the operator's normal business practices such that it was seized upon to cloak discriminatory motive. *Chacon*, 3 FMSHRC at 2516; see also *Turner,* 33 FMSHRC, slip op. at 15, *citing Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc*., 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38).

In *Turne*r, the Commission analyzed the issue of pretext in the context of other federal discrimination statutes, and concluded that a complainant may establish that an operator's explanation is not credible by demonstrating either: (1) that the proffered reason has no basis in fact; (2) that the proffered reason actually did not motivate the adverse action; or (3) that the proffered reason was insufficient to motivate the adverse action. *Turner,* 33 FMSHRC, slip op. at 15, citing *Madden v. Chattanooga City Wide Service Dep't.,* 549 F.3d 666, 675 (6th Cir. 2008) (citing *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)), *overruled on other grounds*, *Geiger v. Tower Automotive,* 579 F.3d 614 (6th Cir. 2009) (emphasis in original)); *McNabola v. Chicago Transit Auth.,* 10 F.3d 501, 513 (7th Cir. 1993). The first type of showing consists of evidence that the proffered basis for the complainant's discharge never happened, *i.e.,* that it was factually false or did not exist. *Turner,* 33 FMSHRC, slip op. at 15, citing *Manzer*, 29 F.3d at 1084. The third type of showing generally consists of evidence that other miners were not fired even though they engaged in substantially similar conduct that allegedly motivated the discharge of complainant. Both types of rebuttal are direct attacks on the credibility of the operator's proffered motivation for firing the miner. *Turner,* 33 FMSHRC, slip op. at 15. By contrast, under the second type of showing, the complainant admits the factual basis underlying the employer's proffered explanation and further admits that such conduct *could* motivate the adverse action (dismissal). The complainant, however, attacks the credibility of the proffered explanation indirectly, by showing circumstances which tend to prove that an illegal motivation was more likely than that offered by the operator. Put differently, the complainant argues that the sheer weight of the circumstantial evidence of discrimination makes it "more likely than not" that the operator's explanation is a pretext. *Id*.

Applying these principles, I find that Cordero failed to demonstrate that Clapp actually was insubordinate. In addition, even assuming arguendo that Clapp was insubordinate, I further find that Cordero failed to demonstrate that Clapp would have been fired for insubordination regardless of her protected activity.

Cordero's primary defense is that Clapp was fired due to her insubordination for failing to report for a scheduled meeting on March 11, 2010.[48] I have found that no specific meeting was set for March 11,

[48] The Secretary argues on brief at 19 that management "did not set a time, location, topic or participants for any additional meeting." Respondent argues on brief that "Clapp was specifically instructed to come back in the morning at her regular shift starting time of 7:00 a.m. and the meeting would be concluded" and that what had started out as a meeting to clear the air and work as a team, had morphed into an

(continued...)

2010 at the end of the long, emotional meeting on March 10, just a continuation of the discussion when Clapp reported for work. Babcock's statement at the end of the March 10 meeting was ambiguous. He told Clapp, "You can take the day. Think about it, and then come in tomorrow ready to go. We'll finish up the conversation tomorrow, and then, you know, and go from there. (G. Ex. 17A, p. 67-68). In fact, Babcock conceded that he did not set a specific meeting place, time or agenda, nor specify who would attend. Rather, he just told Clapp to report for work at the normal time. (Tr. 1054).

More importantly, I have credited Clapp's testimony that she had Fischer and Vaccari's permission to take a floater. Thus, when Clapp initially told Fischer she was taking a floater, Fischer told her, "you can't we got meetings." Clapp said, "Gerald, I did not know that, I am taking a floater." Fischer said, "Okay, fine," and hung up. (Tr. 247). In addition, Vaccari's notes from his March 12 meeting with Clapp and Whitted confirm that Clapp told Vaccari that Fischer did not say that Clapp could not take a floater on March 11, rather Fischer said "OK, goodbye." (Tr. 1096; R. Ex. 20).

Furthermore, I have found that Clapp already had obtained Vaccari's tacit approval earlier that morning to take a floater given her emotional state after the March 10 meeting and the fact that she was up all night and could not sleep. Thus, when Clapp called Vaccari at 5 a.m. on March 11 to schedule a meeting for the next day, Clapp told Vaccari that she had been up all night and that she needed to take a floater. Vaccari told Clapp that he understood. (Tr. 244, 1090-91, 1116-17, 1120-21). After Clapp subsequently spoke with Fischer that day, Vaccari informed Fischer that Clapp had called Vaccari earlier in the day to schedule an appointment and said she needed a floater, and that Vaccari understood. (Tr. 1091-92).

Based on the totality of record evidence evincing Fisher's animus toward Clapp's protected contact with Vaccari about her safety concerns, I infer that Fischer was upset when he learned that Clapp had again contacted Vaccari after her March 10 protected activity, had requested a floater, and had scheduled a meeting with Vaccari for March 12. I have found that Fischer then enlisted the aid of HR Director Clemetson in an effort to seize upon Clapp's failure to report as a pretext for insubordination. According to Fischer, when HR Director Clemetson arrived at the mine that morning, Fischer told her that "we had a meeting set up that morning for 7:00 and that Cindy called in and told me she was taking the day off." (Tr. 951). According to Clemetson's version, however, Fischer told her "that Cindy had not shown up for a meeting that they had scheduled that morning, that she had called in and asked for a floater, and he told her that she needed to come out to her meeting. And she told him no, and he let her know that HR would call her." (Tr. 1135). As noted, I have credited Clapp's testimony, that Fischer ended the conversation by saying "Okay, fine," and that Clapp already had obtained Vaccari's tacit approval to take a floater.

Clemetson called Clapp in Babcock's presence and left a message directing Clapp to report to the mine site by 9 a.m. for the meeting. (Tr. 1047, 1136, 1143). It is undisputed that Clemetson never spoke to Clapp on March 11. In addition, I have credited Clapp's testimony that she never received the message.

(...continued)
employee disciplinary matter. (R. Br. at 13-140).

(Tr. 247-48, 251). Further, I am persuaded by the Secretary's argument on brief that given Clapp's virtually unblemished absence and attendance record over 28 years, she was not the type of miner who would deliberately ignore or fail to show up for a scheduled meeting, particularly on two last and final disciplinary warnings. (Sec. Br. at 37). Moreover, the two-hour time frame that Clemetson gave this long-tenured miner to report appears unreasonably short, and unlike the call that Clemetson placed to Clapp's home on March 18 to summon Clapp to the eventual discharge meeting, there is no evidence that Clemenson asked Clapp to confirm receipt of the message that she left on March 11.[49] In these circumstances, I agree with the Secretary's further argument that if it was so critical to meet with Clapp on March 11, Cordero could have called her later in the day to determine whether she received Clemetson's message. (Sec'y Br. at 37-38). There is no evidence that Cordero did so.

Rather, on the afternoon of March 11, 2010, Vaccari, Clemetson, Babcock, Colby, Fischer and Robinson met to discuss Clapp. Vaccari told the group about Clapp's call to Vaccari earlier that morning about taking a floater and that Vaccari had scheduled a meeting with Clapp the next day, Friday, March 12. Tr. 1047-48, 1137. Vaccari decided that no disciplinary decision would be made on March 11 because Vaccari wanted to meet with Clapp on Friday, March 12. (Tr. 963, 1048, 1137).

On March 12, when Clapp and Whitted met with Vaccari, Clapp homed in on her safety concerns about turning around loaded coal trucks in the slot and dumping them at the face (Tr. 254, R. Ex. 20). She further told Vaccari that Robinson and Fischer were angry with her for expressing her safety concerns to Vaccari and Oistad after Robinson had told the crew that if they had a problem with the truck dumping procedure, take it to Colin Marshall. (Tr. 254, 256). Clapp and Whitted discussed the safety incentive game and the fact that Robinson and Fischer discouraged and intimidated employees in back-room meetings from raising safety concerns. (Tr. 254, 256, 577-79). In fact, Vaccari's notes described the March 10 meeting with Clapp as an intimidation meeting in which an "extremely angry" Fischer allegedly told Clapp "you make me sick always talking safety" and using "safety to get her way." (R. Ex. 20, p. 1).

[49] I note that Clemenson did not testify that she asked Clapp to confirm receipt of the message that she left on March 11, 2010, which requested that Clapp report to the mine site for a March 11 meeting. (Tr. 1143). As noted, Clemetson admitted that she had heard that Clapp never received her message to report to a meeting on March 11. On questioning from the undersigned, Clemetson could not recall when or from whom she heard this. (Tr. 1144-45). On further questioning from the undersigned as to whether she heard this before Respondent made the discharge decision on March 17, 2010 Clemetson could not recall the date. I find, however, that Clemetson obviously knew that Clapp had not received the message before she called Clapp to schedule the discharge meeting on March 18 because Clemetson's March 18 request to have Clapp confirm receipt of the call was based on the fact that she had knowledge that Clapp claimed she had not received Clemetson's March 11 call. Based on demeanor and evasiveness in response to my questioning, I infer that Clemetson's inability to recall was not forthcoming and based on the realization that Clapp's discharge for insubordination may become weaker if Clemetson knew that Clapp did not receive her March 11 message, but went ahead and discharged her anyway on March 18, 2010.

I find that Clapp's March 12 protected safety complaints to Vaccari, which enlisted the aid of another co-worker, was the straw that broke the camel's back, and motivated the Respondent to discharge Clapp. The fact that Cordero retaliated against Whitted on March 19 by taking her crew training position away and by telling her that she no longer had a working relationship with Fischer and Robinson, strengthens my ultimate finding of Cordero's unlawful motivation toward this protected activity. (Tr. 580, 594). In addition, I have found that Clemetson knew that Clapp was claiming that she had never received Clemetson's March 11 message, and nevertheless went ahead and discharged her anyway on March 18, 2010, without any additional investigation.

Finally, Cordero's managers failed to present a consistent and convincing rationale for their recommendations that Clapp was insubordinate. Robinson, Fischer and Colby recommended termination for insubordination because Clapp purportedly refused to come to work for the meeting on March 11. (Tr. 709, 728, 788, 967). In fact, Colby, who signed the discharge letter (R. Ex. 1), limited the discharge to this justification. (Tr. 724-25). Babcock, by contrast, recommended termination for insubordination because Clapp *attempted* to send trucks to the hopper, challenged Robinson over the radio regarding the truck dumping procedure, went to another supervisor with her concerns, allegedly failed to acknowledge that Robinson and Fischer were her supervisors during the March 10 meeting, and allegedly failed to post for the March 11 meeting that Babcock purportedly had scheduled. (Tr. 1051). Clemetson supported the recommendation for termination because Clapp allegedly disregarded the instructions of her supervisor to dump overloaded coal trucks back at the face and allegedly continued to show disrespect for the instructions of her supervisors by failing to show up for the March 11 meeting. (Tr. 1139-40). Vaccari agreed with his leadership team because Clapp allegedly refused to listen to her supervisor and failed to show up for the March 11 meeting. (Tr. 1106-07).

It is well established that where an employer provides an inconsistent or shifting rationale for its actions, a reasonable inference can be drawn that the reason proffered is a pretext designed to mask an unlawful motive. *See e.g., GATX Logistics, Inc*., 323 NLRB 328, 335 (1977). Cordero's purported reasons for the alleged insubordination were either factually false, or not in fact relied upon, because the circumstantial evidence of discrimination makes it more likely than not that Cordero's insubordination defense is pretext. *Id*. *See, e.g., Pro-Spec Painting, Inc*., 339 NLRB 946, 949 (2003); accord: *Shattuck Denn Mining Corp., v. NLRB*, 362 F.2d 466 (9th Cir. 1966). As explained above, Clapp did not refuse to attend a scheduled meeting on March 11. Nor did Clapp send trucks to the hopper that were overloaded or disregard the instructions of her supervisor to dump overloaded coal trucks back at the face. Clapp challenged the directives as unsafe over the radio, but complied with the directives, and then went to Vaccari and Oistad with her safety concerns, which, contrary to Babcock and Clemetson, was not insubordination, but part of her protected activity.

Nor did Clapp fail to acknowledge that Robinson and Fischer were her supervisors during the March 10 meeting. On the contrary, Clapp clearly acknowledged her supervisors' authority at the end of the March 10 meeting. (G. Ex. 17A, p. 59, 65, 68-69). In fact, at the end of the meeting, Clapp acknowledged the need to communicate through Robinson and Fischer, explained that she does follow the chain of command, and explained that she did not come to them with the truck-dumping procedure because she was told to go above them. She credibly testified that there had been no attempt to undermine them, just a breakdown of communication. (Id. at 68; Tr. 238). Clapp agreed that she would follow procedure and the meeting ended. (Id. at 69).

I find that Clapp was not insubordinate during the March 10 meeting, and that her remarks and behavior essentially were provoked by Fischer and fell within the *res gestae* of her protected activity. The Commission has recognized that an employer cannot provoke an employee into an indiscretion and then rely on that indiscretion as grounds for discipline. Generally, an employer may not provoke an employee to a point where the employee commits an act of insubordination and then rely on that insubordination to discipline the employee. *See e.g., Vought Corp*., 273 NLRB 1290, 1295 n.31 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986); *Reading Anthracite Co*., 22 FMSHRC 298, 306 (Mar. 2000). For example, in *Trustees of Boston Univ. v. NLRB*, the First Circuit stated, "at least so long as the employee's indiscretions are not major, it is immaterial that the employee's misconduct would constitute a sufficient reason for discharge if the actual reason for discharge is the employee's participation in [protected] activity." 548 F. 2d. 391, 393 (1st Cir. 1977). That court also indicated that employees are to be given some leeway for impulsive behavior, and that "the leeway is greater when the employee's behavior takes place in response to the employer's wrongful provocation." (*Id).* In fact, the Fourth Circuit has recognized that "[t]he more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression." *NLRB v. M & B Headware Co*., 349 F.2d 170, 174 (4th Cir. 1965).

Here, I find that Clapp's statements during the March 10 meeting were provoked by Fischer's intemperate language and anger that Clapp had gone to Vaccari and Oistad with her safety concerns. Thus, I find that Clapp's behavior and remarks in the March 10 meeting were provoked by Cordero's response to her protected activity. Considering the particular facts and circumstances of this case, when viewed in light of the totality of the record evidence, I conclude that Clapp's conduct during the March 10 meeting was within the scope of the "leeway" the courts and the Commission grant to a miner whose "behavior takes place in response to [[an] employer's wrongful provocation." *Trustees of Boston University,* 548 F. 2d at 393.[50] Since Clapp's behavior during the meeting was provoked and excusable,

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[50] Whether an employee's indiscrete reaction upon being provoked is excusable is a question that depends on the particular facts and circumstances of each case. Interpreting the NLRA, the Seventh Circuit has found that an "employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." *NLRB v. Thor Power Tool Co*., 351 F.2d 584, 587 (7th Cir. 1965). Concededly, in applying this test, some courts interpreting the anti-discrimination provision of the NLRA have found that an employee's egregious conduct was sufficient to strip the employee of that Act's protection, thereby justifying the employee's discharge. For example, in *NLRB v. Louisiana Mfg. Co.*, the Eighth Circuit denied reinstatement to a complainant who was "openly abusive in his language [towards a supervisor] and obviously insubordinate in his conduct." 374 F.2d 696, 706 (8th Cir. 1967). In *NLRB v. Soft Water Laundry, Inc.*, the Fifth Circuit denied reinstatement to an employee who cursed at a supervisor loudly and in the presence of other employees. 346 F.2d 930, 934-35 (5th Cir. 1965). And in *Timpte, Inc. v. NLRB*, the Tenth Circuit found that the termination of an employee who refused to stop using foul language and disparaging other employees after being warned not to do so was not discriminatory. 590 F.2d 871, 873-74 (10th Cir. 1979). Other courts, however, have found adverse actions based ostensibly on vulgar employee outbursts to be improper where the employee's conduct was provoked by unjustified employer action. For instance, in *Trustees of Boston University*, the First Circuit upheld an administrative law judge's excusing of an employee's misconduct because it was stimulated by the

(continued...)

Cordero's insubordination defense based on any behavior or remarks during the March 10 meeting must also fail.

Finally, Clapp was not insubordinate when she and Whitted met with Vaccari on March 12 to convey serious safety concerns. I find that such conduct was the epitome of protected activity and was the final event that precipitated her discharge.

In sum, it has long been recognized that where an employer's reasons are false, it can be inferred "that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where … the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corp., v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); see also *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (200)). I conclude that the surrounding facts in the extant record support the inference that Cordero's various explanations that it discharged Clapp for insubordination are pretext seized upon as a convenient rationale to mask its unlawful motivation. In these circumstances, Cordero has failed to establish that it would have discharged Clapp for insubordinate conduct even in the absence of her ongoing and extensive protected activity. Having found that the proffered rationale for Clapp's discharge is not credible and was merely a pretext for termination because of her protected safety complaints, I find that the Secretary has sustained her burden of proving by a preponderance of the evidence that Clapp's termination on March 18, 2010 was in violation of section 105(c)(1) of the Act.

IV. Back Pay Issues

Clapp's back pay period runs from the date of her termination on Thursday, March 18, 2010 until her temporary economic reinstatement effective Thursday, June 24, 2010. The amount of back pay due is ordinarily equal to the amount of gross pay the miner would have earned but for the discrimination, less actual net interim earnings, plus interest, reduced in appropriate circumstances by a willful loss of earnings when the operator raises the affirmative defense that the miner has failed to diligently search for alternative work. *Gabel Stone Co*., 23 FMSHRC 1222, 1224 (Nov. 2001). The operator bears the burden of proof on the affirmative defense of failure to mitigate damages, and the determination of what constitutes a reasonable effort to find alternative employment is based on the factual background peculiar to each case. *Id.* at 1225, *citing Metric Constructors*, *Inc*., 6 FMSHRC 226, 232 (Feb. 1984).

(...continued)
employer's own wrongful conduct. 548 F. 2d at 392-93. In *Coors Container Co. v. NLRB*, the Tenth Circuit held that the complaining employees' unprotected behavior -- cursing at employer-hired security guards who attempted to prevent the employees from engaging in protected activity -- was excusable impulsive behavior, which did not justify discharge. 628 F. 2d 1283, 1285, 1288 (1Oth Cir. 1980). In *NLRB v. Steinerfilm, Inc.*, the First Circuit upheld a decision of the NLRB excusing a complainant's offensive and abusive language, which occurred during a confrontation with a supervisor in reaction to the supervisor's unjustified warning of the complainant. 669 F. 2d 845, 852 (1st Cir. 1982). And in *M & B Headwear*, the Fourth Circuit upheld the reinstatement of a complainant who, after her discriminatory layoff, threatened a supervisor and was rude to a vice-president, because "the unjust and discriminatory treatment of [the complainant] gave rise to the antagonistic environment in which these remarks were made." 349 F. 2d at 174.

In an effort to meet its burden of proof on cross examination of Clapp, Respondent established that since Clapp was terminated on March 18, 2010, Clapp "applied" for work at one other mine in the Powder River Basin. (Tr. 377). Respondent's counsel then asked Clapp, "Otherwise, you've not seen any jobs that pay you at the same pay rate, is that right?" Clapp responded, "I have looked yes, but not interviewed." Counsel then asked, "So no other but the one application," to which Clapp responded, "Correct." (*Id*.). The court then asked when Clapp made that application, and Clapp responded on April 27, 2010. The court further asked whether Clapp applied anywhere else after she received the order of temporary economic reinstatement. Clapp responded, "I have looked for work but not applied." Respondent's counsel then ended cross examination of Clapp. (Tr. 378).

On redirect examination, Clapp testified that she does not have a computer and went to Workforce in Gillette, Wyoming to help her look for jobs that were in the Powder River Basin. Through that effort, she found out that Buckskin Mine was hiring equipment operators and truck drivers. Clapp further testified that she had three days to send in a resume and she was called for an interview on April 27, 2010. Tr. 382. When asked how the interview went, Clapp testified that it was a good interview, but uncomfortable because Clapp had to disclose on the application form that she had a job for 28 years but was no longer employed there. Tr. 382-83. Clapp further testified that the first question asked in the interview was why she was not working there anymore and Clapp told the interviewer that she had been fired, as advised to do by Workforce. When the interviewer asked why Clapp had been fired, Clapp responded that she had worked 28 years at a mine with over 23 bosses and she ran into two bosses that she could not please. Clapp testified that she has not seen any openings for shovel operator positions in the Basin. Tr. 383. She further testified that such jobs are normally filled through an internal process when a miner bids to move up into the position. Tr. 384.

On re-cross, Clapp confirmed that she had been looking for other positions at mines during the back pay period and she did not limit her search to shovel operator positions since her interview with Buckskin mine was not for a shovel operator position. Tr. 396-97.

Respondent argues on brief that Clapp is not entitled to an award of back pay because she failed to mitigate her damages and incurred a willful loss of earnings by failing to make a reasonable, good-faith effort to find alternative employment. Respondent cites none of the facts from the testimony outlined above, other than the fact that Clapp has only applied for one job since her termination and has not seen openings for shovel operators in the Basin. Because Clapp has not applied for more than one job since her termination, Respondent argues that she has not made a reasonable, good-faith effort to find new employment. R. Br. at 36.

I reject Respondent's argument, which conflates employment application with reasonable efforts to search for alternative employment. I find that Respondent has failed to meet its burden of proof on the affirmative defense that that Clapp failed to mitigate damages. On consideration of all the evidence, Respondent has failed to establish that Clapp failed to conduct a reasonable search for comparable employment or sustained a willful loss of earnings. Rather, the credited testimony of Clapp establishes that she "lowered her sights" beyond shovel operator positions and made a reasonable search for alternative mining work in the local mining community during the back-pay period in an effort to mitigate back-pay liability, but was unsuccessful under difficult and trying circumstances. Based on her reasonable efforts, I find that Clapp is entitled to full back pay for 14 weeks.

V. Civil Penalty Principles

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

> The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria: [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.
>
> 22 FMSHRC at 600, citing 30 U.S.C. § 820(I) (italics added).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Act. *Id*. at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In exercising this discretion, the Commission has recently reiterated that a judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). In addition, the *de novo* assessment of civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). However, when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed. *Spartan Mining,* 30 FMSHRC at 699. Otherwise, without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg*, 5 FMSHRC at 293.

A. Explanation for Civil Penalty Assessed

As noted, Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Here, the Secretary has proposed assessment of a civil

penalty in the amount of $20,000 for the § 105(c) violation committed by Respondent when terminating the employment of Clapp for exercising her statutory rights under the Act. In requesting the civil penalty, the complaint of discrimination avers in a short and plain statement that "[b]y terminating Cindy L. Clapp, Respondent discouraged the exercise of rights protected by the Act and undermined safety at the Cordero mine." (Complaint of Discrimination at 2, para. 6). Furthermore, on brief, the Secretary argues the proposed penalty is appropriate because "Cordero is a large mine employing over 500 people, the mine was highly negligent and lacked good faith by directly retaliating against one of the mine's strongest safety advocates, and increased the likelihood of injury at the mine by stifling, open effective communication about safety issues." Sec. Br. at 40. Respondent answers that the proposed penalty assessment in excessive in light of the factors specified in section 110(i) of the Mine Act, and argues that the complaint does not "include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act," as required by Commission Rule 44. (Answer at 2, para. 10).

Liberally construing the complaint allegations as a basic pleading to frame the issues to be tried, I find that the complaint is marginally sufficient to pass muster under Commission Procedural Rule 44. See generally, *Carmichael v. Jim Walker Resources, Inc.*, 20 FMSHRC 479, 484, n. 9 (May 1988). Accordingly, I address the penalty criteria in section 110(i) in light of the facts in the record.

I strongly agree with the Secretary's arguments, as quoted above. Furthermore, based on additional facts in the existing record, particularly the evidence of the chilling effect that Clapp's discharge had on the rights of other miners to bring safety-related complaints to management's attention at the Cordero Mine, I conclude that the proposed penalty of $20,000 is insufficient to effectuate the deterrent purpose underlying the Act's penalty assessment scheme.

The Secretary introduced no evidence of previous violations at the Cordero mine. Nor did the Secretary introduce evidence to establish that the Respondent has a history of violations of § 105(c) of the Act at this mine. The single 105(c) case that my Westlaw search uncovered was dismissed back in 1995.

With respect to whether Cordero's managers, including human resource personnel, were negligent in discharging Clapp for protected activity, I find that their negligence was high because they knew or should have known that Clapp's discharge was unlawful based on the strength of the prima facie case and the pretextual nature of the alleged insubordination, as detailed herein. In these circumstances, I find no mitigating circumstances present. Moreover, given the breakdown in communication between D-crew personnel and Fischer and Robinson over safety concerns, Vaccari and HR had various courses of action available, apart from the unlawful discharge of Clapp.

The gravity of Clapp's unlawful discharge was severe and struck to the core of the Act. As Congress emphasized in Section 2(a) of the Mine Act, "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner." Clapp's unlawful discharge undermines the strong anti-retaliation

provisions in Section 105(c)(1) that were designed to encourage miners to become more involved in voicing concerns about mine safety and health and to protect them against any possible discrimination for doing so. *See* S. Rep. No. 95-181 (1977).

In addition, this record establishes that Respondent's retaliation against Clapp was egregious especially because Clapp was the most vocal safety advocate at the mine and Clapp's discharge had a chilling effect on the willingness of other miners to report safety concerns to Fischer and Robinson.[51] A few examples of record testimony suffice. D-crew driver Artz credibly testified that Clapp always voiced concerns for safety. After she was fired, however, the D crew members were hesitant to raise safety issues (like chunks on the road or highwall failures) because open communication with D-crew management had broken down. (Tr. 430). Similarly, D-crew driver Miller was visibly upset on the witness stand and broke down crying because she was afraid to lose to her job for testifying against Cordero based on what happened to Clapp for raising safety issues with Vaccari. (Tr. 517-19).[52] Miller then credibly testified that Clapp's firing had a deleterious effect on D-crew communication because miners declined to raise issues that they normally would have for fear of being fired. (Tr. 535). Similarly, D-crew driver Whitted credibly testified that Clapp's termination instilled a huge fear factor in D-crew miners, who viewed Clapp as a mentor, "because if they fire her after 30 years, what will they do to the rest of us who don't have the time in?" (Tr. 583). Whitted likewise broke down crying on the stand when she recounted the fact that she acted in concert with Clapp to meet with Vaccari over safety issues and the breakdown in communication. (Tr. 577-79). Furthermore, I have inferred that Cordero did retaliate against Whitted for protected activity that she engaged in with Clapp on March 12. In these circumstances, I find that Clapp's discharge had a particularly chilling effect on the willingness of other miners to raise safety issues at the mine.

I also find that Cordero did not demonstrate good faith by attempting to achieve rapid compliance after notification by the Secretary that Clapp's discharge was unlawful. In the temporary reinstatement proceeding, Cordero contested actual reinstatement and agreed to temporary economic reinstatement, effective 1June 24, 2010, more than three months after

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[51] The record reflects that even before Clapp's discharge, when she was on last and final warnings, other miners were reluctant to come forward to Fischer and Robinson with safety concerns. Thus, in the winter months of late 2009 and early 2010, Clapp called Fischer and Robinson on behalf of several truck drivers on her crew, including Helen Clark, Fallon Halverson, and Bob Brown, because their requests for water were ignored and they, unlike Clapp, chose not to risk angering Fischer or Robinson by continuing to call for water. (Tr. 112-115). Similarly, the credible testimony of numerous miners corroborated Clapp's testimony that turning around and dumping loaded coal trucks back at the face raised various safety concerns, but those employees, unlike Clapp, were reluctant to report their concerns to management. (Tr. 417-19, 446, 449-453) (Artz); 503 (Stephens); 541, 552 (Miller); 565, 585-86 (Whitted); and 619-20 (Halverson)).

[52] Similarly, D-crew driver Halverson, who testified pursuant to subpoena, testified that she was "terrified" to testify against Cordero because of fear of retaliation. (Tr. 600).

Clapp's March 18, 2010 discharge. During preparation for the discrimination trial, Cordero failed to respond to certain discovery requests, thereby precipitating the Secretary to file a motion to compel discovery, which resulted in my Order Granting Secretary's Motion to Compel Discovery, With Redaction Procedure. Although Respondent is free to pursue a vigorous defense, Respondent likewise assumes the risk of litigation when it is found, as here, that its defense is pretextual, lacks merit, and undercuts its good faith in attempting to achieve rapid compliance after notification of the violation.

Finally, I consider the appropriateness of the penalty to the size of Cordero's business. The record establishes that the Cordero Mine is a large, open-pit, surface coal mine with several miles of haul roads and ramps, located in Campbell County near Gillette, Wyoming. The non-union operation is owned by Cloud Peak Energy Company, following a spinoff from Rio Tinto in November 2009. Given the size of the mine, its parent, and the coal trucks in use, annual tonnage is indeed large. Cordero failed to offer any argument or evidence that its ability to continue in business would be impaired by the proposed civil penalty. *Sellersburg*, 5 FMSHRC at 294, *citing Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973). Moreover, Cordero failed to introduce any financial information or other specific information on the issue of whether the proposed penalty was inappropriate to the size of Respondent's business or adversely affected its ability to remain in business. Absent proof that the imposition of authorized penalties would adversely affect Cordero's ability to stay in business, it is presumed that no such adverse affect will occur. *See Broken Hill Mining Co.*, 19 FSSHRC 673, 677 (Apr. 1997) (*citing Sellersburg*, 5 FMSHRC at 294, which cited *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (Sept. 1973); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994). *See also Steele Branch Mining*, 18 FMSHRC 6, 15 (Jan. 1996).

Given my consideration of the appropriate penalty criteria explained above, the overarching purpose of the Act to protect miners from any retaliation for actively raising safety and health concerns, the deterrent purposes of the Act, and the evident chilling effect that the unlawful discharge of the leading safety advocate had on the willingness of other miners to raise safety issues at the mine, I double the statutory penalty to $40,000. Having observed the witnesses herein, including the fact that subpoenaed miners Miller and Whitted broke down in tears on the witness stand for fear of Respondent's retaliation against them (Tr. 517, 577), I am troubled by the chilling effect that Clapp's discharge has had on other miners' willingness to step forward and engage in protected activity under the Act. That right is fundamental for miners' safety and health!

V. CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction in this proceeding.

2. Respondent, Cordero Mining, LLC violated § 105(c) of the Act by discriminating against and discharging Cindy Clapp and otherwise interfering with her safety-complaint rights under the Act.

VI. ORDER

Section 105(c)(2) of the Act provides, in pertinent part:

> "The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest. . . . ."

The Mine Act's anti-discrimination provisions must be broadly interpreted in order to further the congressional aim of making this Nation's coal and other mines safe places to work. Accordingly, the undersigned Administrative Law Judge of the Federal Mine Safety and Health Review Commission **ORDERS** that the Respondent, Cordero Mining, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against Cindy Clapp or any other miner because they have engaged in protected activity under the Mine Act.

(b) In any like or related manner discriminating against or otherwise interfering with miners in the exercise of the rights guaranteed them by Section 105(c)(1) of the Mine Act.

2. Take the following affirmative action necessary to effectuate the policies of the Mine Act.

(a) Within 14 days from the date of this Order, offer Cindy Clapp immediate and full reinstatement to her former job as a Level 6 shovel operator, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, including any right to the expungement or non-consideration of disciplinary warnings under any company policy or practice after a certain period of time, including the time since Clapp's unlawful discharge until her reinstatement, and also including any right to remedial training that Clapp may have for diminution of skills during the period of her unlawful discharge.

(b) Within 14 days from the date of this Order, make Cindy Clapp whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest, as prescribed in Commission precedent at the IRS "adjusted prime rate" for the March 18 to June 24, 2010 back-pay period, as set forth in *Secretary of behalf of Bailey v. Arkansas-Carnoa Co*., 6 FMSHRC 2042, 2049-54 (Dec. 1983).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Cindy Clapp, and, within 3 days thereafter, notify her in writing that this has been done and that her unlawful discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Secretary of Labor or MSHA may allow for good cause shown, provide at a reasonable place designated by the Secretary of Labor or MSHA or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(e) Within 14 days from the date of this Order, pay to the Secretary of Labor a civil penalty in the amount of $40,000.

(f) Within 14 days from the date of this Order, post a copy of this Decision and Order and maintain such posting for 60 consecutive days in conspicuous places, including all places where notices to miners are customarily posted. In addition to physical posting of this Decision and Order, this Decision and Order shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its miners by such means. Reasonable steps shall be taken by the Respondent to ensure that this Decision and Order is not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the Cordero Mine involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the Decision and Order to all current employees and former employees employed by the Respondent at any time since March 18, 2010.

(g) Within 21 days from the date of this Order, Respondent shall file with the Secretary of Labor or MSHA, a sworn certification from a responsible official attesting to the steps that the Respondent has taken to comply with the terms of this Order.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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December 13, 2012*

PATTISON SAND COMPANY, LLC, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. CENT 2012-137-RM
v.	:	Citation No. 8659952; 11/09/2011
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 2012-138-RM Order No. 8659953; 11/09/2011 Mine: Pattison Sand Company, LLC Mine ID: 13-02297

DECISION AND ORDER

Appearances: Jamison P. Milford, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, and Lynne Dunbar, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Respondent

Henry Chajet, Esq., David Farber, Esq., and Ed Wisneski, Esq., Patton Boggs LLP, 2550 M. St. NW, Washington, D.C., for Contestant

Before: Judge McCarthy

I. Statement of the Case

The above-captioned matter is before me on a Notice of Contest filed by the Contestant pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). On November 9, 2011, MSHA issued Citation No. 8659952 for an alleged violation of ground support use standard 30 C.F.R. § 57.3360.[1] The Citation alleges:

> The ground control system in use by the mine has not been adequately designed, installed and maintained to control the ground conditions found where persons work or travel. A roof fall estimated at 20-30 tons occurred in an area mined up to "Cap Rock." This fall occurred in an unbolted area of the mine and a portion of the fall landed on top

* This decision incorporates the corrections to the typographical errors in the Amended Decision and Order issued January 12, 2012.

[1] 30 C.F.R. §57.3360 provides: Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

> of the scaling equipment being operated by a miner causing extensive damage to the equipment. This could have resulted in a fatality. In accordance with its ground control plan the mine has relied on scaling as the only ground control in areas mined to the "Cap Rock" unless a pothole or brow existed, or there was less than 4 feet of Cap Rock." As evidenced by the fall, mining up to the "Cap Rock" and scaling is not adequate to insure miner safety.[2]

Sec. Ex. 1. The gravity of the citation is designated as significant and substantial and reasonably likely to result in a fatality, with moderate negligence, and one person affected.

On November 9, 2011, MSHA also issued Order No. 8659953 under section 103(k) of the Act based on the alleged roof fall "accident" that occurred at Pattison Sand Company Mine on November 7, 2011. The 103(k) Order alleges:

> A roof fall accident occurred at this mine on November 7, 2011. A roof estimated at 20 to 30 tons occurred in 12 AR, an unbolted area of the mine and a portion of the fall landed on top of the scaling equipment being operated by a miner causing extensive damage to the equipment. This could have resulted in a fatality. This order is issued to assure the safety of persons at this operation. It prohibits all activity in all areas of the mine South of crosscut L that are not bolted and meshed until an MSHA examination and/or investigation has determined that it is safe to resume mining operations in the area. The mine operator shall obtain prior approval from an authorized representative for all actions to restore operations to the affected area.

The section 103(k) Order was subsequently modified three times. A November 9, 2011 modification (8659953-01) allowed the mine operator to retrieve equipment needed for bolting and to allow the mine operator to institute the bolting process. A November 15, 2011 modification (8659953-02) allowed the operator to go underground and evaluate the ground conditions south of crosscut L. Personnel were limited to three individuals, inclusive of both mine and/or contractor personnel. Equipment was limited to that needed to transport the individuals conducting the evaluation. The time allowed underground was no more than 20 hours starting on November 15 and ending on November 19, 2011. A November 16, 2011 modification (8659953-02) allowed up to four individual and the use of the JLG under ground to evaluate ground conditions and the time allowed under ground was limited to the 20 hours requested by the mine operator and ending on November 20, 2011. Sec. Ex. 4.

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[2] Cap rock is a stronger, harder, or more resistant rock type overlying the weaker ore body or less resistant rock type. Tr. 88, 282.

On November 11, 2011, Contestant filed a Motion for Emergency Expedited Hearing based on the 103(k) withdrawal order, which closed those portions of the underground operation south of crosscut L that were not bolted or meshed. On November 15, 2011, Contestant filed a Supplemental Motion for Emergency Expedited Hearing based on a November 15, 2011 modification of the order. I convened a conference call with the parties on November 16, 2011 and set this matter for expedited hearing on November 18, 2011.

An expedited hearing took place in Washington, DC on November 18, 2011. Witnesses traveled from the North Cental part of the United States to attend the expedited hearing on short notice. At the outset of the hearing, I heard oral argument on Contestant's Expedited Motion to Dismiss or, in the Alternative, for Temporary Relief, and on Contestant's Motion in Limine. I denied the motion in limine and held in abeyance my ruling on the motion to dismiss or for temporary relief.

At the close of the hearing, the parties agreed to an expedited briefing schedule and Contestant requested that if any aspect of my decision is adverse to Pattison, that I certify the matter for "emergency appeal." Accordingly, a short briefing schedule was set with briefs due on December 2, 2011, one week after receipt of the expedited transcript on the penultimate eve of the Thanksgiving holiday. Tr. 339-43.

Thereafter, on November 21, 2011, Contestant filed a Motion for Decision without Briefing on the Scope of the 103(k) Order, Based Upon Record Evidence. On November 23, 2011, the Secretary filed her opposition to the motion claiming that Contestant's mine closure and concomitant due process "taking" arguments were factually and legally insufficient.[3] On November 28, 2011, Contestant filed a reply. On November 30, 2011, I issued an extensive Order denying Contestant's motion for decision without briefing and denying Contestant's motion for certification of my interlocutory ruling.

On Friday, December 9, 2011, at 5:46 p.m., as this Decision and Order was near completion, Contestant filed an Emergency Motion to Modify 103(k) Order to permit its experts to enter the underground portion of the mine to examine and evaluate conditions, install monitoring equipment and conduct tests. On Monday, December 12, 2011, during normal

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[3] I note that Contestant's Fifth Amendment taking argument, which I rejected as inchoate and not ripe in my November 30 Order, has only been alluded in oblique fashion in Contestant's post-hearing brief. *See, e.g.*, Br. at 32. I further note that I have been administratively advised that yesterday Contestant filed a civil action for declaratory and injunctive relief against MSHA and the Commission in the United States District Court for the Northern District of Iowa pursuant to the due process clause of the Fifth Amendment to the United States Constitution, the Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and the inherent powers of the Court to review *ultra vires* actions of federal government agencies and officials, despite the fact that Contestant has not yet exhausted its administrative remedies.

business hours, the Secretary filed her terse Opposition and Motion to Strike Contestant's Emergency Motion to Modify 103(k) Order based on the fact that the Court already has before it the issue of the scope of the 103(k) Order, and Contestant's motion is an improper attempt to supplement the record with regard to that issue. The Secretary's motion to strike is denied and Contestant's motion is discussed and dealt with herein.

This contest proceeding, now fully briefed by the parties, presents the following issues: (1) whether Citation No. 8659953 is valid, as written, or should be vacated; (2) whether Section 103(k) Order No. 8659952 is valid as written and modified, or should be vacated because no accident occurred; (3) even assuming an accident occurred, whether the scope of the 103(k) order is unreasonable or an abuse of discretion; and (4) whether the Commission has authority to modify or limit the scope of the 103(k) Order, and whether it should do so.

On the entire record, including my observation of the demeanor of the witnesses,[4] and after considering the post-hearing briefs,[5] I make the following:

II. Factual Background

A. Stipulated Facts

The parties stipulated to the following facts.

1. Contestant Pattison Sand, LLC, ("Pattison") is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 as it is a mine operator as defined under section 3(d) of the Act and its products enter, in effect, interstate commerce.

2. The Federal Mine Safety and Health Review Commission has jurisdiction in this matter.

3. Citation No. 8659952 and Order No. 8659953 were properly served by a duly authorized representative of the Secretary of Labor upon an agent of Pattison on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance but not the truth or relevancy of any statements asserted therein or for their legal validity.

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[4] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

[5] Contestant attached Exhibits A-D to its post-hearing brief. These exhibits are not part of the record and will not be considered herein. I place them in a rejected exhibit file.

4. Pattison mines and processes sandstone both underground and above ground in order to produce frac sand in its Clayton County, Iowa mine where it operates. It operates on 12-hour shifts, working 7 days a week, 365 days per year, employing about 190 persons.

5. No one was injured in the ground fall that occurred that resulted in the citation and order under contest.

6. No mine explosion, mine ignition, mine fire, mine inundation or any injury or death of any person occurred at the mine when the ground fall occurred.

7. The ground fall was not at or above an anchored zone in an active working or in an area where bolts were in use.

8. The ground fall was not an outburst.

9. The ground fall did not impair ventilation nor result in an entrapment for more than 30 minutes or entrapment that had a reasonable potential to cause death.

10. The 103(k) order resulted in underground areas of the mine being shut down south of crosscut L that were not bolted and meshed.

11. No stipulation number eleven was read into the record.

12. The ground fall occurred at about 3:00 a.m. on November 7th, 2011, during the milling/scaling of the roof using mechanical equipment with a canopy that protects the operator.

13. The ground fall occurred when Pattison was following an MSHA reviewed, negotiated, and accepted comprehensive ground control plan.

14. MSHA personnel were in and around the underground areas of the mine from November 7, 2011, through November 9, 2011, and completed their investigation safely and without incident on November 9.

15. MSHA inspector Jim Hines, during his November 7 inspection, told the mine operator that the ground fall was not an immediately reportable event under 30 CFR Part 50.
16. MSHA did not issue any closure order, citation, or other withdrawal or closure order between November 7 and November 9 when the contested order and citation were issued.

B. The History of Roof Falls, the Imminent Danger Order, the Ground Control Plan, and the Testimony of MSHA's Ground Control Expert

On August 3, 2011, MSHA issued a section 107(a) imminent danger Order closing the mine due to concerns about roof falls in the underground portion of the mine. Tr. 153, 213, 224-25, 229. That Order is not in evidence.

MSHA inspectors, including James Alan Hines from the Fort Dodge, Iowa field office, visited the mine on August 9, 2011 to document any roof falls or other ground conditions after the imminent danger order issued. Tr. 213, 261.[6] MSHA North Central District Manager, Steven Richetti, whose office is located in Duluth, Minnesota, credibly testified that the inspectors observed about 9-11 roof falls in the mine about a week after the August 3 imminent danger order, some of which were similar in appearance to the instant roof fall on November 7, 2011. Tr. 261. Secretary Exhibits 11 and 12 are photographs that depict two of these August 2011 roof falls in areas south of crosscut L,[7] which were taken by MSHA district office staff assistant, William Pomeroy, during an August 16, 2011 visit to the mine. Secretary Ex. 11 depicts a roof fall in cap rock material in an area that was bermed off between highways 4 and 5 and crosscut AT, which occurred after the imminent danger order was written on August 3 and before it was documented by inspector Hines during the August 9, 2011 visit. Secretary Exhibit 12 depicts another roof fall in cap rock in an area that had been bermed off, but the specific location of the fall was not established. Tr. 212-20. Pomeroy did not know whether these falls occurred in active working areas or closed areas of the mine, but that areas south of AQ were mined up to cap rock. Tr. 221.

The Secretary proffered and the court accepted Dr. Christopher Mark as an expert in ground control. (Tr. 64-71; Sec. Ex. 13, Mark C.V.). Dr. Mark had been asked by Joe Main, Assistant Secretary of Labor for Mine Safety and Health, to assist MSHA technical support in their evaluation of the roof conditions at the mine in August 2011. Tr. 74**.** Other than his August 2011 visit to the Pattison sandstone mine, Dr. Mark has never done any roof control evaluation work at other underground sandstone mines, only three of which apparently exist in the United States, but he has performed extensive ground and roof control work in coal mines, many of which have sandstone roofs, with similar bedded sedimentary composite, and he has extensive experience with rock mass classification systems that are applied throughout the field of ground control and rock engineering. Tr. 68-69. In these circumstances, I reject Contestant's arguments on post-hearing brief at 31, that Dr. Mark, has no expertise in sandstone mines or in ground control issues beyond the coal-mine environment, and, therefore, no experience working in a sandstone mine or experience analyzing the particular rock formation and related dynamics unique to the sandstone mine environment.

Dr. Mark visited the mine on or about August 19, 2011. He observed lots of evidence where rock had fallen from the roof. There were a number of instances of fresh debris on the

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[6] Hines has ten to twelve years of underground mining experience in limestone mines. (Tr. 162). In 2010, he was assigned as the MSHA inspector to regularly inspect Contestant's sandstone mine. (Tr. 132). In that year, Hines conducted four regular inspections, that were each five to six weeks in duration. (Tr. 133, 163-64). As a result of these inspections and multiple hazard complaint and accident inspections, Hines has visited Contestant's mine fifteen to twenty times since 2010. (Tr. 133, 163-64).

[7] Secretary Exhibit 6 reflects a map of the mine. Sec. Ex. 6.

floor of the mine and a lot more evidence in the roof indicating recent falls of ground. Tr. 86. Many of the falls that Dr. Mark observed were in areas mined to cap rock. Tr. 87.

To settle the 107(a) enforcement action, Contestant and MSHA negotiated a ground control plan that MSHA District Manager Richetti approved in early October 2011. Tr. 229, 235-36. As a result, Pattison became the only mine in the North Central District to have an MSHA-approved ground control plan. Tr. 230. It was the first ground control plan Richetta had seen. Tr. 237-38.

Dr. Mark participated in the plan negotiations with Contestant's consultants Maochen Ge and John Head of Missouri Rolla university. Tr. 91. Dr. Mark testified that during negotiations, MSHA was concerned that there was an unacceptably high risk of unpredictable rock falls that could cause injuries throughout the mine, but MSHA could not predict where, when, or how big they might be, so engineered support (roof bolts and mesh) should be required throughout the mine to mitigate that hazard, but Pattison's experts did not agree. Tr. 93, 95. Pattison's position was that four feet of cap rock would provide effective support, and where there was less than four feet of cap rock, Pattison would install bolts and mesh. Tr. 96. Dr. Mark testified that MSHA did not believe that four feet of cap rock alone could provide effective support to miners working underneath the unsupported top, but reluctantly agreed with Pattison's position in the ground control plan because roof bolting in other areas was introduced for the first time over a fairly large scale, and if Pattison's experts were wrong, the plan would be revisited. Tr. 98-100. Dr. Mark explained that MSHA did not believe at the time that it had sufficient engineering and scientific data to justify going to court on the imminent danger order to obtain what it thought were appropriate protections for workers, but could not prove. Tr. 101.

At the hearing, however, after the instant roof fall, Dr. Mark opined that cap rock is not effective support. Tr. 100-02. When asked by the court why MSHA did not "stick to its guns," Dr. Mark explained that MSHA did not feel strongly enough about its position and the plan did include major improvements over the extant ground control practice at the mine, including provisions for bolting and meshing in areas that did not have four feet of cap rock and requirements that the operator test to ensure that cap rock was present. Tr. 102-03.

Under the roof support provisions of the MSHA-approved ground control plan, all areas covering AQ and South and all areas to be mined in the future, would be mined up to the cap rock and carefully monitored and routinely scaled, as needed. Much of this area was already mined to cap rock. Only areas with less than 4 feet of cap rock thickness, or which have brows or potholes, would be bolted, meshed and shotcreted. Sec. Ex. 5, p. 2 and 3. Thus, the plan addressed not only those portions of the mine that would require "bolting and meshing," but also those portions of the mine that could be mined to caprock without a need for bolts and mesh. *Id*. The plan also anticipated that "brows" and "potholes" would occur from time to time in cap rock, and the parties agreed to specific actions to address such situations. *Id*. The plan anticipated that there would be extensive work in areas both mined and not mined to cap rock and that miners would be scaling down areas where there were risks of the roof degrading over time. *Id*.

As Contestant points out on brief, Dr. Mark did not visit the Pattison mine after the November 7 roof fall. Tr. 116. Dr. Mark did not remember whether he visited the area of the instant ground fall during his August visit or whether the area had been closed off by the imminent danger order, but he was in the general vicinity near the outcrop and the roof looked great at that time, like nice solid cap rock. Tr. 116-17, 119. Dr. Mark did examine inspection photos taking after the November 7 roof fall, and testified that he observed in the photographs the same kind of roof fall and debris that he had seen during his August visit. Tr. 110. Based on the mine map, he testified that the cap rock in the November 7 roof fall was in an area mined to cap rock, and although he did not know whether that cap rock was different from cap rock located elsewhere, none of Pattison's experts ever indicated that there were different kinds of cap rock depending on where in the mine it was located, and there was no feasible way of knowing in advance whether cap rock would suddenly collapse, as in the November 7 roof fall. Tr. 112-13, 120. In Dr. Mark**'s** professional opinion, the risk of a roof fall similar to that which occurred on November 7 is unacceptably high anywhere in the mine where there is no roof support system in place. This opinion was based on the failure of the cap rock as roof support during the November 7 roof fall, as miners would be exposed to the hazard anywhere a miner worked or traveled that is not protected by an engineered support system such as bolts and mesh. Tr. 113-14. He testified that his professional opinion about ground conditions in this mine did not depend upon the precise location of any particular observations that he made. Tr. 117.

When asked on cross whether he observed the gully on the side of the surface, Dr. Mark Parks replied, "The little drainage creak that comes out and around there? I can't say that I did make specific notice of that." Tr. 119. Dr. Mark knew that the gully on the surface was 80 feet from the location of the November 7 roof fall, but he did not know whether the gully approached any other location in the mine. Tr. 120. He further testified on cross, that the cap rock does degrade over time through effective ventilation and humidity, necessitating frequent scaling to take down loose rock, however, scaling was an inappropriate engineering technique to eliminate the hazard of unpredictable rock falls at this mine. Tr. 121. Dr. Mark further testified on cross that most of the professionals in the ground control field cannot pinpoint the cause of a ground fall, only that there are a combination of factors that either increase or decrease the probability of a roof fall occurring. Tr. 122. Consequently, Dr. Mark's work focuses on the ability to make better estimates of what the probability of a ground failure is, which he testified is more reliable most of the time than reliance on a particular mechanism triggering failure. Tr. 122. He further testified that there is some relationship between the stability of the cap rock, the potential for ground fall, and humidity, and some relationship between pillar degradation and depth of cover, although he could not quantify it, and that any weakness in the structure of the rock mass, such as bedding plains or fractures or joints, certainly affects the likelihood of a roof failure. Tr. 123-24. Dr. Mark admitted that he did not examine or perform any evaluation of intrusions of either minerals, clays, water, layering, overburdened conditions or death of cover in the rock fall area. Tr. 124.

On redirect, Dr. Mark testified that MSHA is charged with protecting miners from other incidents like the instant roof fall and the issue is not whether MSHA understands all the

mechanisms that took place in this particular fall, but whether it can identify specific features that will allow MSHA to identify other areas that are at higher risk. At the moment, all MSHA knows is that 4- foot thick cap rock section fell in and could have caused a fatality and there is no evidence that the properties of that cap rock are different from the cap rock elsewhere in the mine, but such cap rock is being relied upon to provide sufficient protection. Tr. 126. He testified that it is pure speculation to suggest that because the roof fall happens be near some surface weakening factors in the ground, an overall stable structure can be created. Tr. 126-27.

On re-cross, Dr. Mark acknowledged that shotcrete and scaling were employed in many areas of the mine and the miner who was scaling during the instant roof fall was protected by a cab with protective canopy, cage, and long boom. Tr. 129-130.

C. The November 7 Roof Fall and Inspection and the November 9 Citation and Order

On November 7, 2011 at approximately 3:00 a.m., a ground fall occurred at the Mine while Pattison was milling/scaling the roof "using mechanical equipment with a canopy that protects the operator." Stip. 12, Tr. 36. "The ground fall occurred when Pattison was following an MSHA reviewed, negotiated, and accepted comprehensive ground control plan." Stip. 13,Tr. 36. "No one was injured in the ground fall that occurred that resulted in the citation and order under contest." Stip. 5, Tr. 35. The fall occurred in 12AR. Tr. 333, 142. Immediately before the ground fall, the excavator operator had been conducting scaling work. Tr. 144-45. He saw some liquid dribbling down, which caused him to stop the excavator and back up. (Id.) At that point, the ground fall occurred. *Id*. The miner was not injured or trapped. *Id*.

The ground fall did not involve any "mine explosion, mine ignition, mine fire, mine inundation or any injury or death of any person." Stip. 6, Tr. 35. The fall "was not at or above an anchored zone in an active working or in an area where bolts were in use," (Stip. 7, Tr. 35:19-21), and it "was not an outburst." Stip. 8, Tr. 35-36. "The ground fall did not impair ventilation nor result in an entrapment for more than 30 minutes or entrapment that had a reasonable potential to cause death." Stip. 9, Tr. 36.

Later that day, MSHA inspector Hines responded to a hazard complaint of an unreported accident and fall of roof where someone may have been injured. Tr. 135-136. Hines arrived at the mine around 4:00 p.m. and met with a mine management representative to provide a copy of the complaint. They proceeded underground to the accident site. Tr. 136-137. Hines was joined underground by Kyle Pattison, the owner of the mine. Tr. 140.

Hines observed and photographed the accident site, which showed a roof fall partially covering an excavator. Tr. 136-143, 181-183; Sec. Exs. 1 & 2. Hines and Pattison agreed that the material that had fallen was cap rock, and that the rocks on top of and around the excavator were twelve to eighteen inches thick. (Tr. 140). Hines and Pattison jointly made a "guesstimate" of the weight of the fallen rock to be 20 to 30 tons. Tr. 141. No one could get near the rock fall area, which had been bermed off by Contestant, but Hines took measurements at an equivalent location and measured the dimensions of the fall at 30-35 feet, with the width of the mine

passageway at 35 feet, 11 inches. Tr. 140-143. Miners were bolting and meshing in the area and attempting to move closer to the excavator. Tr. 181-82.

Hines' investigation continued through Tuesday, November 8, 2011. Tr. 149. He interviewed miner Brandon Millin, who was operating the excavator at the time the roof fell. Tr. 144-147. Millin said he was scaling, everything looked okay, but then he saw some dribbling and hit the sticks to go backwards, but he was caught in the roof fall. Tr. 144-145. The roof fall damaged the door of the excavator, but he was able to kick it open and get out, at which point he put his head down and ran from the area. Tr. 145. Millin was not injured. Tr. 145. Hines also talked to Chris Lehman, the mine manager, and Ryan Rodenberg, a day-shift supervisor. Tr. 147-148. Both confirmed that cap rock had fallen. Tr. 147-148.

Hines was joined at the mine by MSHA inspector Runyon, who also visited and photographed the roof fall. Tr. 193-195; Sec. Exs. 7, 8, and 9. Runyon observed that the area where the fall had occurred was bermed off and could not be traversed. Tr. 201-202.[8] I find that the ground fall did impede passage and occurred in active workings as the scaler was actively performing his assigned task. I further note that the parties' stipulations Nos. 7, 9 and 15 and are not broad enough to preclude this finding.

On November 9, 2011, after consulting with his colleagues, Hines issued the section 104(a) citation and section 103(k) order to Contestant. Hines testified to the basis for his S&S, gravity, and negligence determinations, and his basis for finding one person affected. Tr. 167-70. Although the citation contains no action to terminate, Hines testified that he discussed termination with Kyle Pattison and suggested that Pattison resubmit a plan that Hines would forward to MSHA tech support to determine whether the new plan would work, and that once all parties agreed to a plan that worked, he would terminate the citation. Tr. 173-74. Both Hines and Richetta testified that at the time the citation and order were issued Contestant was not violating the ground control plan. Tr. 158, 173, 177, 255. Hines and Richetta both testified, however, that the ground control plan was not working - because "cap rock is still coming down." Tr. 154, *see also* Tr. 159-160, 173-174, 233-237. The following colloquy from Contestant's cross-examination of Richetta, elucidates MSHA's concern:

> Q. Okay. The 103 order covers that intersection [AC 3], doesn't it?
> A. Yes.
> Q. Okay.
> A. Unless it's been bolted and meshed.
> Q. Right.
> A. I don't know what part has been bolted and meshed.
> Q. Okay. We'll stipulate that AC 3 has not been bolted or meshed yet.

[8] The record establishes that inspector Runyon subsequently wrote a citation for bad ground in the roof pursuant to 30 C.F.R. 56.3200 in October 2011, but that citation is not before me. Tr. 204.

A. Okay.
Q. Okay. What evidence do you have that there is any danger in the ground at that intersection?
A. The cap rock was supposed to be the best part of your mine. The cap rock failed. It was not bolted and meshed. This area is either going to be mined up to the cap rock, which then, in my opinion, needs - is going to behave like the cap rock. Or if it was worse than the cap rock and needed to be bolted and meshed to start with, it needs to be done now before it can fall on someone.
Q. You don't have any specific information about that particular intersection. Your conclusion is based upon your general understanding of cap rock?
A. It's been -- it's based on the history of the falls in that mine.
Q. Okay. And if cap rock in your view fell at AR, then the cap rock at AC 3 must behave the same way; is that right?
A. It was Pattison's contention that the cap rock would behave the same all over the mine.
Q. Someone from Pattison told you that?
A. Their plan said that all they had to do to the cap rock was mill it, examine it. And if there was brows and potouts less than 4-foot thick, it would be bolted. Otherwise, the cap rock would not create a problem.
Q. So you know that the ground control plan that you approved discusses different kinds of things that can happen in cap rock. It can brow. It could form a pothole. It could be 4-foot thick. It can be less than 4-foot thick, right? The plan addresses all those contingencies, doesn't it?
A. Right. But the plan also leaves open the possibility that something can happen like happened in AR where there wasn't a brow or a potout. And it wasn't less than 4-foot thick.
Q. Okay. And that was the plan you approved, right?
A. As a settlement.

(Tr. 256-259).

The scope of the 103(k) Order affected only areas underground that were south of crosscut L and not bolted or meshed. Tr. 161, 236; Sec. Ex. 4. Underground areas north of crosscut L, and areas bolted or meshed, were not affected by the 103(k) Order, including the area where the primary crusher and wet screen operate. Tr. 165.

Based on his personal observation involving a lot of roof falls at the Pattison mine that were in cap rock, certified MSHA Inspector Jim Hines credibly testified that he issued the 103(k) Order to keep miners out from under unsupported top that had been mined up to cap rock because the ground control plan, which MSHA had approved in settlement of an imminent

danger order involving another roof fall at the mine in August 2011, did not work. Tr. 152-161; *see also* Tr. 224-25 (MSHA inspector Anthony Runyon testifying about August 3, 2011 imminent danger order).

Based on the instant roof fall under the approved ground control plan and the history of roof falls in cap rock at the mine, MSHA's ground support expert, Dr. Mark, and other witnesses concluded that MSHA had erred in approving the plan as a result of the imminent danger order settlement because cap rock was not effective support in areas covered by the 103(k) Order. Tr. 98-101, 159, 161-62, 233-37, 250, 258. In fact, MSHA District Manager, Steven Richetti, candidly admitted on cross examination that the ground control plan was a settlement of the prior imminent danger order, which he felt was the best he could do at the time, but in hindsight, he should not have agreed to the plan because miners were exposed to the hazard of roof falls from cap rock. Tr. 237, 250. When asked on cross examination whether the 103(k) Order was an attempt to undo the 107(a) imminent danger order settlement that was approved only a month earlier in October 2011, District Manager Richetti further credibly testified:

> A. No. The 103(k) order is trying to protect the miners. The citation for [56.3360] is trying to undo the settlement or trying to correct the ground control plan. The 103(k) is to issue – it was issued to protect the miners in the rest of the mine from the same type of hazard that the scaler operator was exposed to in 12 AR.
>
> Q. Okay. And its your intention not to lift the 103(k) order until the entire mine is bolted and meshed, correct?
>
> A. The 103(k) order could be modified as it's bolted and meshed or some other type of ground support that our experts would feel would be sufficient, yes.

When further asked on cross examination to point out any particular areas of the mine that are in danger of ground fall, Richetti referenced "[a]ny unsupported part of that mine could fall at any time without warning to people that are traveling in the mine or working under it" and that "[b]olting and meshing will correct the immediate hazard" and "shotcreting would be a plus." Tr. 251-52. Richetti's conclusion that the cap rock was unsafe without these precautions was based on the history of falls in the mine. Tr. 258. Dr. Mark, who observed roof falls in areas mined to cap rock when visiting the mine as MSHA's expert in August 2011, corroborated the conclusions of Hines and Richetta that cap rock, without engineering support, could not provide effective roof support. Tr. 98-100. Dr. Mark opined that an unacceptably high risk of roof falls, akin to the instant fall of November 7, 2011, existed anywhere in the underground mine where an engineered roof support system was not in place, as demonstrated by the failure of cap rock as roof support during the instant fall. Tr. 114.

D. The Testimony of Contestant's Expert and Assistant Mine Manager

Mr. David West, Contestant's international expert in mining engineering and ground control in sandstone mines (Tr. 275) offered a different opinion than MSHA's expert and

witnesses.[9] West testified that reports from Contestant's ground control consultants (Maochen Ge and John Head),[10] who contributed to Contestant's ground control plan, led him to suspect a close correlation between the material properties and behavior of the St. Peter sandstone at the Pattison mine and the Athabasca sandstone deposit throughout Northern Canada, where West worked in just about every operating mine on ground control, support, and design issues. Tr. 273-74, 283-84, 289. West's testimony relied heavily on an unspecified publication by Professor Morgenstern at the University of Alberta, [11]whom West described as a well-recognized guru in soil mechanics. West endorsed Morgenstern's description of both the Athabasca sandstone and the St. Peter sandstone as "locked sand," which West testified was an excellent geotechnical material for excavating holes, until it gets wet or moist and becomes extremely friable, a phenomenon dubbed "air slaking." Tr. 284-85.

Initially, on direct examination, West had difficulty directly answering counsel's question about whether the Pattison cap rock would form a good roof or whether additional work for ground control was necessary. Tr. 286-290. He then testified that the zone of anchorage is the cap rock and that his investigation revealed that the Contestant tried to quantify the consistency or variability of the cap rock by drilling 50 test holes ("scratch tests") to probe the thickness and strength of the cap rock throughout the mine, and the results were pretty consistent based on West's discussion with the bolting supervisor, who performed the tests. Tr. 291-92. West initially testified that the extant ground control plan was sufficient (Tr. 292), but retreated somewhat from this view when describing improvements that should be made to the plan, as discussed below. Tr. 307-311, 316.

West then proffered the opinion that the cap rock in the area of the fall (12 AR) was different than the cap rock in other areas because it had been locally compromised by the presence of a gully on the surface topography. Tr. 293, 323.[12]

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[9] West was retained by Contestant on November 14, flew to the mine on November 15, reviewed MSHA technical reports and Contestant's MSHA-approved ground control plan on the plane, visited with mine management and rank-and-file, and spent most of November 16 underground examining the geological conditions of the mine. Tr. 277-82. West was paid his standard hourly rate for his services. Tr. 320-21. West was Contestant's representative under the sequestration rule, and thus was present throughout the hearing. Tr. 53.

[10] West testified that he had a long and close personal relationship with Head, spoke to Ge about this matter, and had firsthand knowledge of how they work. Tr. 304, 311-12. He obviously had a favorable opinion of their work.

[11] This publication was attached as Ex. D to Contestant's post-hearing brief, but has been excluded from the record and placed in the rejected exhibit file. *See* note 5, *supra*.

[12] West testified that the gully was not in direct vertical line from the ground fall in AR-12, but about 60-70 feet away. Tr. 322.

> What I read about all this stuff on Morgenstern, the locked sand, the air slaking and discussions with the crews, I started thinking, well, hang on. This has got something to do with it, the failure mechanism that we are seeing.

Tr. 323. West testified that there were a number of parameters involved in the failure and he tried to narrow it down and determine the main driver that caused the problem and whether there were similar conditions or a combination of parameters elsewhere in the mine. He determined that the presence of the gully on the topography, which *might* allow the preferential ingress of water or moisture and cause an air-slake problem, was a *somewhat* unique combination relative to the rest of the mine such that the extrapolation of those factors to other areas mined up to cap rock is a bit of a quantum leap. Tr. 294-96. West did acknowledge, however, "that there are areas in the mine that are susceptible to air-slake within the St. Peter sandstone." Tr. 295.

West further opined that the milling equipment and mining and milling methods used by Pattison were safe for miners. Tr. 297-99. That conclusion, however, appears to be undercut by the instant roof fall and the prior imminent danger order. West further opined that the ground control plan was a dynamic document, and was actually an Excel spreadsheet with an attached schedule, which was constantly changing, provided for appropriate contingencies, such as potholes and brows in the roof, and provided design drawings (C. Ex. 2) for implementation of the plan where bolting was required. Tr. 330-03.

Contrary to MSHA representatives, West testified that if Pattison implements the ground control plan, it will be safe for miners to work in the mine. In response to counsel's questions, West reiterated that 12 AR is not indicative of ground or cap rock conditions anywhere else in the mine, that the roof fall that happened there was anomalous based upon his observations of the gully while on the surface, and that there is no basis for the closure of any area of the mine other than 12 AR. Tr. 304-05.

In response to relatively open-ended cross examination, West testified that there was no basis to clearly determine that the cap rock is unstable throughout the whole mine. He acknowledged, however, that there are specific areas where there has been failure into the cap rock. Tr. 306. He then hedged, stating that Pattison was an extensive mine where one tries to manage and minimize the risk to maintain safety and "it's not a negligent process because the mine has maybe one failure." Tr. 306-07. On further cross, West again acknowledged that there are specific areas where he has seen failures to a certain degree in the cap rock, but it is not ubiquitous throughout the mine. Tr. 307.

When asked by the Court what was needed going forward, given those areas of cap rock failure, West opined that the essence was already in the plan, but he would divide the mine into three or four areas of similar properties or structure, which vary throughout the mine, and then tweak the plan with periodic inspection, documentation and testing. If further deterioration occurred, he suggested that the operator's stakeholders and production crew conduct an

operational meeting to discuss increasing the level of ground control.[13] Tr. 309-310. When asked by the court whether he would make any modifications to the plan, West suggested improving the collective understanding of the air-slaking process and adding some simple, robust instrumentation to the ventilation provisions of the plan, akin to tempering the air to try and take the moisture out of it. Tr. 310-11, 314; Sec. Ex. 5, p. 4, VI.

On redirect, West conceded that some of the failures could have resulted from moisture in the atmosphere moving into the cap rock, but he testified that bolting and meshing would not prevent slaking from the moisture in the air. Tr. 313. Rather, West opined that a very thin layer of shotcrete would be the best way to seal off the surface of the sandstone and prevent the absorption of moisture from the ventilation system. Tr. 316. Then, however, when asked whether shotcreting over the cap rock would be a more effective solution than bolting and meshing, West equivocated. "It could be. Right now I don't know. But I think that's part of the – the basket of things to investigate. And that should be part of the ground control plan." Tr. 316.

Finally, West testified that owner Kyle Pattison told him that the mine had an underground grain storage area, and if the moisture content of the grain reached a certain level, it would ferment and more moisture would be given off. Based on his conversation with Pattison, West testified that there were ground problems in the grain storage area associated with humidity brought in by the grain. Tr. 329. Upon further probing from the court, West could not recall where the grain storage area was located on the map of the underground workings. Tr. 330.

In addition to West, Pattison also called assistant mine manager, Jack Porter, as a witness. Tr. 331-32. Porter testified that he felt safe walking in and around areas of the underground operation that were mined up to cap rock. Tr. 334. With respect to ground control methods used for areas not mined to cap rock, Porter testified that Pattison milled with a mechanical scaler, performed hand scaling with a scaling bar, used some shotcreting with pins and rebar, and "just lately" started doing bolting because of the new ground control plan. Tr. 335.[14] Porter further testified that he felt safe walking under those areas, and added, "They look good to me, and nothing has fell [sic] on me." Tr. 336.[15]

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[13] I note that West did not specifically discuss MSHA when referencing the stakeholders. Tr. 309-10.

[14] Contestant had ordered a new bolting machine, which had not arrived yet, as the existing bolting machine was not ideal. Tr. 326.

[15] After Contestant's case, the Secretary proffered no rebuttal. Tr. 339.

E. E-mail Correspondence Underlying Contestant's Emergency Motion to Modify 103(k) Order

After the hearing, in a December 6, 2011 email, Kyle Pattison wrote Richetta, as follows:

> I wish to appraise (sic) and update you on the progress of the ongoing work at the Pattison Mine. There was a teleconference call earlier today (5/12/2011) (sic) between Dr. C. Marks, Dr. Maochen Ge and Mr. Dave West. The subject of the call was to further discuss our proposed work plan and the modification of the existing K Order at the Pattison Mine. It is my understanding that Dr. Marks presented the position that MSHA is unwilling to allow any work at the Pattison Mine that is not performed beneath a bolted and screened roof. In addition, Dr. Marks stated that this would certainly apply to what he described as "research orientated work."

I understand that Mr. West explained that our proposed work plan is not "research orientated," that it is designed to produce practical results with short term goals.

Mr. West has suggested that PSC provide MSHA with an update and additional details concerning the proposed work plan to facilitate their decision on the request for the K Order modification. As stated previously the current program of work that is envisaged is preliminary, our intent is to periodically review and revise the program where necessary and to include any additional tasks that deem merit. Further details of the program, (i.e. a detailed description of the tasks and scheduled durations) will be developed in due course and shared for review by all the interested parties, (i.e. MSHA, JHSC, Univ. Missouri, PSC, etc.).

An outline of the current tasks is as follows:

- Dr. Maochen Ge, Dr. Jerry Tien and Mr. Dave West are planning to visit the Pattison Mine during the 12th to the 15th December. They will perform the preliminary work for the program of activities. They will require access to the mine to establish locations and install instrumentation for monitoring. It is anticipated the inspection will require access to the mine on Monday through Thursday, (December 12th to 15th).

- All the areas of the mine that are options for instrumentation and monitoring sites were inspected by Dave West and Chris Lehman on Friday 2nd December. At that time all of these areas showed no visible signs of deterioration.

- It is proposed that each of the selected areas will again be first thoroughly inspected on 12th December before any of the proposed work activities are performed. This will include hand scaling in each area to "sound" if any deterioration has affected the area. If conditions warrant, this will be followed with a thorough mechanical scaling and an application of shotcrete if required. Our objective is to make each area safe before any work is started.

- Our proposed work plan involves the local installation of Worker Safety type instrumentation, such as GMM's, (Ground Movement Monitors). It is my understanding that a description of the installation and reading procedures has been forwarded to Dr. Mark and that he is familiar with this type of instrument. It is our intent to install these instruments in any access to the work locations before the work begins. The GMM's will be read at regular intervals during the work program.

- We will apply shotcrete wherever this is deemed to be necessary. It should be noted this was an acceptable approach as agreed to by MSHA in the support of the Centrifuge location.

- Please recognize that both Dr. Maochen Ge and Dr. Jerry Tien have busy schedules. This is a limited window of opportunity, therefore we ask you to approve the requested modification to the K Order so we can provide acceptable solutions for all the parties concerned. The objective of their visit is to develop a ground control instrumentation and data collection program at the mine. Their visit will also address the future mine ventilation plans. It is our intention to ensure that the work by Maochen and Jerry will be practical and provide immediate feedback. The instrumentation and monitoring program consists of:

    - Worker Safety Instrumentation. This involves the installation of GMM's (Ground Movement Monitors), these are linear potentiometers installed on TBE mechanical rock bolts of various lengths. GMM's are read with a simple resistance multimeter, any change in resistance is directly proportional to displacement. The Workers (and JHSC) can be quickly instructed in reading and interpreting the instruments. GMM's will become part of the 5 Point Safety Inspection procedure. This instrumentation will be a priority.

    - Design Instrumentation. This involves monitoring the ground response to collect numbers for feedback into the mine design. The areas to be addressed include: mine pillars, roof spans and issues related to air slacking. The priority of these instrumentation programs will be a secondary to the Worker Safety Instrumentation and each element will have different durations. The likely durations will be established by Maochen and Jerry during their site visit.

    - Ventilation instrumentation and monitoring. PSC's future plans include the use of VNetPC ventilation modeling software, this will enable potential improvements in the control of the mine atmosphere, (i.e. moisture content & air slack potential). Jerry Tien will require access to the mine under full ventilation to determine the locations for monitoring stations.

It is anticipated that intermittent access to the mine will be required during the site visit. It is intended that in due course the instrumentation locations, types and purpose of each instrument will be presented to MSHA, JHOC, etc., for their review and input.

See Emergency Motion at Ex. A, pp. 1-3.

F. MSHA's Rejection of the Requested Modification

In a December 7, 2011 response, Richetta wrote, as follows:

Kyle, MSHA believes that it is not possible to determine the stability of the roof at the Pattison Mine from visual observations. Experience has shown that even roof that has been freshly scaled may suddenly collapse without warning. The only way that the roof can be "made safe" is to install roof support. While MSHA is willing to discuss alternative support designs for the future, at present we believe that the most appropriate support pattern is the one developed by Pattison's rock mechanics consultant and described in Pattison's ground control plan, namely 8 ft. bolts with mesh.

MSHA believes that the proposed activities as described are "research oriented." Ground Movement Monitors are not an acceptable replacement for roof support in the Pattison Mine. For such monitors to have any validity as warning devices, it is necessary to first collect data on the magnitudes and rates of roof movement that indicate impending collapse. Enough data must be collected so that the conclusions are statistically valid. No such data has been collected at Pattison, or (to our knowledge) from any other sand mine. Since the only possible purpose of the proposed Univ. Missouri work is to collect such data, it must be considered as research. Similarly, while studies of the mine design and ventilation issues are desirable, they do not address the immediate need for roof support at the mine.

In summary, MSHA does not believe that proposed work plan justifies the exposure of individuals to the hazards of the unsupported roof at the Pattison Mine.

See Emergency Motion at Ex. A, p. 1.

III. The Position of the Parties

A. The Secretary's Arguments

1. The Section 103(k) Order

a. Overview of Arguments

In her post-hearing brief, the Secretary frames three issues presented by the 103(k) Order; 1) whether the November 7, 2011 ground fall was an "accident" within the meaning of the Mine

Act; 2) whether the scope of the section 103(k) order is appropriate; and 3) what if any, temporary relief may the Court grant Contestant under section 105(b)(2) of the Act by modifying the section 103(k) order?

The Secretary notes that my November 30, 2011 Order Denying Request for Decision Without Briefing found that an "accident" did occur which satisfies the precondition for issuance of a section 103(k) order. Order at 4. Therefore, the Secretary argues that MSHA's issuance of the 103(k) order was not an abuse of discretion.

In addition, the Secretary argues that the scope of the 103(k) order is reasonable because MSHA considered all relevant factors in deciding to apply the order to unbolted and unmeshed cap rock throughout the underground portions of the mine, and articulated a rational connection between those factors and the adverse safety hazards associated with unbolted and unmeshed cap rock. In deciding to apply the order to unbolted and unmeshed cap rock, the Secretary states that MSHA considered, inter alia, Contestant's representations that cap rock was sufficiently stable such that roof bolts and mesh were unnecessary, that the cap rock roof fall on November 7, 2011 occurred after Contestant's representations about the purported stability of cap rock, and the mine's history of cap rock roof falls throughout the underground portions of this mine, both before and after the November 7 "accident." Accordingly, the Secretary argues that the scope of the 103(k) order is reasonable and should not be disturbed.

Finally, the Secretary argues that the Commission does not have the authority to modify the issuance of a 103(k) order in any way - it must either sustain the order if it is reasonable, or vacate the order if it is arbitrary and capricious. She argues that the issuance of the order, which also identifies its scope, was reasonable and must be sustained.

b. The Secretary's Argument That the Scope of the Section 103(k) Order Is Appropriate

The Secretary emphasizes that the Mine Act gives MSHA "plenary power" and "complete control" to make post-accident orders for the purpose of protection and safety of all persons. *See Miller Mining Company, Inc. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983). MSHA has broad authority to issue 103(k) orders to effectuate this purpose. *See Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ Barbour); *West Ridge Resources, Inc*., 31 FMSHRC 287 (Feb. 2009) (ALJ Manning). This broad grant of authority is recognized in the legislative history, which states that:

> [t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and … to issue orders is intended to provide the Secretary with flexibility in

> responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977), *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978) (emphasis added).

The Secretary notes that the Commission has not decided the appropriate standard for reviewing a Section 103(k) order. *See Eastern Assoc. Coal Corp*., 2 FMSHRC 2467, 2472 n.7 (1980) (declining to determine whether a Section 103(k) order is reviewable on an arbitrary or capricious, reasonableness, or de novo basis). In light of the broad discretion afforded the Secretary under Section 103(k), the Secretary argues claims that it is appropriate that Section 103(k) orders be reviewed under an "arbitrary or capricious" standard. *See S. Rep. 95-181*, at 29, reprinted in Legis. Hist. at 617 (Section 103(k) authorizes the Secretary "to exercise broad discretion in order to protect the life or to insure the safety of any person") (emphasis added); *see also Miller Mining Co.*, 713 F.2d at 490 ("Section 103(k) gives MSHA plenary power to make post-accident orders for the protection and safety of all persons") (emphasis added). The Secretary argues that in *Miller Mining Co.*, the court effectively applied that standard, holding that MSHA's modification of a Section 103(k) order was "reasonably tailored to the situation." 713 F.2d at 490.

The Secretary further notes that the Commission in *Twentymile Coal Co.*, 30 FMSHRC 736 (Aug. 2008) applied the following guidance in determining if the actions of a district manager were arbitrary and capricious:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing the explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

30 FMSHRC at 754-55, *quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). *See also Emerald Coal Resources*, 30 FMSHRC 122, n. 1 (Jan. 2008) (ALJ Zielinski) ("While the Act does not specifically provide for review of section 103(k) orders, the Commission has jurisdiction to review such orders under an abuse of discretion

standard."). *Eastern Ass. Coal Co.*, 2 FMSHRC 2467 (Sept. 1980)."); *Southern Ohio Coal Co.*, 13 FMSHRC 1783, 1801 (Nov. 1991) (ALJ Koutras) (holding that the issuance of the 103(k) order was "not an unreasonable or arbitrary abuse of [the inspector's] authority or discretion.").

The Secretary emphasizes that "[a] party seeking to have a court declare an agency action to be arbitrary and capricious carries 'a heavy burden indeed.' " *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738, 745 (D.C. Cir. 2001) (*quoting Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000)). That party must show that the agency has failed to consider relevant factors, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), has made a clear error in judgment, *see id.*, or has failed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The arbitrary and capricious standard of review is "highly deferential" and "presumes the validity of agency action." *City of Portland, Oregon v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (citations and internal quotation marks omitted).

The Secretary argues that the scope of the section 103(k) order in this case was based on the fact that the roof fall had occurred from cap rock. She notes that in approving the ground control plan, MSHA accepted Contestant's representations that throughout its mine, roof mined to cap rock needed to be scaled, but otherwise needed no additional support and would not fall, where there were no brows, potholes, or cap rock thickness of less than four feet. The Secretary argues, however, that none of thoseconditions obtained where the roof fell. Moreover, the Secretary highlights the mine's extensive history of roof falls, including falls from roof mined to cap rock without brows, potholes, or cap rock less than four feet thick. The Secretary emphasizes that after the instant roof fall MSHA now considers bolting and meshing to be the best method to insure miner safety in this mine. Since the fall was from roof that Contestant believed to be the safest, MSHA concluded that the safety of other roof in the mine south of crosscut L that was not bolted and meshed – some of which already had, or was scheduled to have, some type of ground support – was called into question. Accordingly, MSHA issued the section 103(k) order prohibiting all activity in the proscribed parts of the mine that are not bolted and meshed until an MSHA examination or investigation has determined that it is safe to resume mining operations in the area.

c. The Secretary Argues That the Commission Does Not Have Authority to Modify the Issuance of a Section 103(k) Order

The Secretary notes that Contestant has asked the Court to modify the section 103(k) order as issued by limiting its scope to the 12AR of the mine where the roof fall occurred, citing Tr. 47 ("The only relief we want is to limit the order -- under the temporary relief provision, the only relief we want is to limit the order to the area affected, which is the area where the fall occurred."); *see also* Contestant's Motion for Decision Without Briefing on Scope of 103(k) Order at 1-3 (requesting invalidation or restriction of the scope of the section 103(k) order).

With respect to temporary relief under 105(b)(2) of the Act, the Secretary relies on *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 642 F.3d 234, 239 (D.C. Cir. 2011), where the D.C. Circuit held that "§ 105 means what it says: temporary relief is available from any modification or termination of any order or from any issuance of an order under § 104." Accordingly, the Secretary argues that while the Commission can grant temporary relief under Section 105(b)(2) of the Act from the modification or termination of a Section 103(k) order, it cannot grant temporary relief from the issuance of a Section 103(k) order, which is the relief sought by Contestant in this case.

d. The Secretary Argues That Contestant Is Not Entitled to Temporary Relief Under Section 105(b)(2) Because It Has Not Established a Substantial Likelihood That It Will Prevail, Nor Has It Established the Requested Relief Will Not Adversely Affect the Health and Safety of Miners

The Secretary notes that even if section 105(b)(2) relief is found to be available to Contestant, it is conditioned on a showing by Contestant that: (A) a hearing has been held in which all parties were given an opportunity to be heard; (B) the applicant shows that there is a substantial likelihood that the findings of the Commission will be favorable to the applicant; and (C) such relief will not adversely affect the health and safety of miners.

The Secretary argues that Contestant has made no showing of substantial likelihood, particularly since its arguments are based primarily on its position that the roof fall was not an accident. The Secretary relies on her showing that the scope of the order is appropriate and not arbitrary and capricious. In addition, the Secretary highlights additional evidence at the hearing, in part from Contestant's expert, which purportedly shows that the possibility of roof falls throughout Contestant's mine, with concomitant harm to the health and safety of miners, exists throughout the mine, and not just in the 12 AR section where the instant roof fall occurred. The Secretary notes that Contestant's expert has seen specific *areas* of cap rock failure and expressed concern about the air-slake process as the key to a lot of the other failures. Tr. 307, 311. Given such evidence, the Secretary argues that Contestant has not shown that temporary relief from the Section 103(k) order will not adversely affect the safety of miners.

2. The Section 104(a) Citation under 30 C.F.R. § 57.3360

Using the coal mine plan-dispute case law as a guide,[16] the Secretary argues that Contestant can violate Part 57.3360 even though it may be complying with an agreed-upon roof

[16] In using the coal-plan-dispute case law as an analogy, the Secretary does not advocate a wholesale incorporation of that coal case law, or the coal standards, into the metal/nonmetal context. She notes that coal plans are required by the mandatory standards, metal/nonmetal plans are not. However, she argues that in agreeing to the plan in the instant case, Contestant has conceded that ground control was "necessary" for its mine, and it is bound by that admission.

control plan. The Secretary notes that coal mine plans, including ventilation, roof control, or other plans, are negotiated between MSHA officials and operators, and are intended to address dynamic conditions in specific mines. She notes that conditions in any given mine may change faster than the parties can negotiate new plan terms, and it is the operator's responsibility to monitor and ensure that hazardous conditions are corrected.

The Secretary argues that in agreeing to a ground control plan, Contestant conceded that ground control was "necessary" for purposes of 30 C.F.R. Part 57.3360, which requires that "system" to "be designed, installed, and maintained" when "ground conditions, or mining experience in similar ground conditions in the mine," suggest its necessity, especially if the system or components of that system need to be changed. The Secretary argues that neither "plans" in the coal mine context, nor "systems" in the context of Part 57.3360, are static concepts or documents, and to construe them otherwise essentially relieves an operator of its fundamental responsibility under the Mine Act.[17]

a. The Case Law in the Coal Mine Plan-Dispute Context Demonstrates that Contestant Can Violate 30 C.F.R. § 57.3360 Despite Compliance With An Agreed-Upon Plan

The Secretary emphasizes that coal mine dispute plans (by analogy) are not "contracts," are continuous in nature, and require good-faith negotiations between MSHA and the operator to maximize safety and health provisions for miners in the context of a particular mine. *See, e.g., Penn Allegh Coal Co.*, 3 FMSHRC 2767 (Aug. 1981). She notes that even Contestant's expert recognizes that the dynamic nature of the mining environment requires constant attention to the provisions in a plan. Tr. 300, 308-311.

The Secretary argues that in coal cases, an operator may fail to comply with a standard even though it fulfills all conditions of an approved plan. *See Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n*, 519 F.3d 1176, 1191-93 (10th Cir. 2008). For example, in *Plateau Mining*, the operator appealed from a Commission decision that it could be violating a ventilation standard even though it had fulfilled all the conditions of its approved mine ventilation plan. *Id*. The Commission recognized that "mine ventilation is a dynamic process" and that "the provisions of a ventilation plan may not be able to address every contingency." *Id*. at 1192. In affirming the Commission, the Tenth Circuit noted that the Third Circuit had reached the same result in *Cumberland Coal. Res., LP v. Fed. Mine Safety & Health Review Comm'n*,

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[17] The Secretary argues that in using the term "system," Part 57.3360 contemplates a type of "plan" to address ground control. She notes that the dictionary defines the "system" as "a group of interacting, interrelated, or interdependent elements forming or regarded as forming a collective entity." *American Heritage Dictionary of the English Language*, s.v. "system" (Boston: Houghton Mifflin Company, 1976). While the term "plan" has a technical meaning in the coal context, the Secretary asserts that it is used more generally in the context of this particular case.

515 F.23d 247, 254 (3d Cir. 2008) (compliance with an approved ventilation plan was not a defense to a violation of 30 C.F.R. § 75.334(b)(1)).

Similarly, the Secretary relies on language in *Utah Power & Light Co. v. Secretary of Labor*, 951 F.2d 292 (10th Cir. 1991), where the Tenth Circuit stated:

> It seems clear that the prohibition against accumulation (embodied in both statute and regulation) has independent significance. Petitioner's contentions that it is void for vagueness or arbitrariness, or is somehow merged into or limited by the requirement of a cleanup plan (so that the plan formulated by the company constitutes a "safe harbor" superseding the prohibition against accumulations unless and until the Mine Safety and Health Administration points out defects in the cleanup plan) are utterly unpersuasive.

Id. at 295.

The Secretary acknowledges, however, that for an operator to violate the standard, it must be on notice of the problem, and the adequacy of any particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *see also Plateau Mining Corp*., 519 F.3d at 1192 (*quoting from Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). The Secretary notes that in *Canon*, the Commission found that there had been no objective signs prior to the roof fall that would have alerted a reasonably prudent operator to provide additional support, and therefore vacated the citation. *Id*. Similarly in *Newmont Gold*, a case in which David West also testified as an expert, the Secretary notes that the "Leaky Fault" that caused the ground fall was "subtle, variable and unpredictable." *Newmont Gold Co.*, 20 FMSHRC 1035, 1039 (Sept. 1998) (ALJ Cetti). Moreover, she notes that Judge Cetti found that geological faults, many of which were undetectable until mined through, were present throughout the mine, and insufficient to have alerted a reasonably prudent operator to provide additional support. *Id.* at 1040.

The Secretary argues that unlike *Newmont Gold*, the conditions at the Pattison Mine mine provided ample warning to Contestant. She argues that Contestant's expert readily found objective signs that existed prior to the roof fall that should have alerted Contestant of the need for additional roof support - specifically that "the strength of the cap rock has been compromised by the presence of a gully on the surface topography." Tr. 293. The Secretary argues that this finding wholly substantiates the Secretary's position that the plan did not work and was in violation of the standard, despite approval of the plan and the fact that Contestant was not violating the plan. Moreover, while West concluded that the AR 12 ground fall was "unique to that location primarily due to the surface gully" (Tr. 296, *see also* Tr. 304-305), a conclusion that the Secretary's expert disputes, the Secretary argues that West clearly acknowledged other roof falls and the possibility of roof falls throughout Contestant's mine, with concomitant harm to the

health and safety of miners by testifying that he has seen specific areas of cap rock failure. Tr. 307.

Furthermore, when asked by the Court if he would make any modifications to the existing plan, West opined that a better or improved level of understanding of the air-slake process, which he viewed as key to a lot of the failures, would be facilitated by "some simple robust implementation." Tr. 310-311. The Secretary argues that this testimony is further evidence that an approved plan does not thereby become inexorably a plan that works, and a plan that "is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon,* 9 FMSHRC at 668. Accordingly, the Secretary argues that Contestant can be in full compliance with the plan and still violate Part 57.3360, particularly since Contestant was well aware of the roof hazards at this mine.

b. The Secretary Argues That the Cited Condition Violated the Standard and was S&S

The Secretary notes that to establish a violation of 30 C.F.R. § 57.3360, the Secretary must prove that: 1) "support" was not used or was not "designed, installed, and maintained;" 2) to control "ground;" 3) in places where persons work or travel in performing their assigned tasks; and 4) where ground conditions or mining experience in similar ground conditions in the mine indicate that it is necessary. The Secretary further notes that the standard applies to the conditions and mining methods in use at Contestant's underground mine, and its purpose is to insure that Contestant's miners are not injured by rock material while doing their jobs by keeping the rock in place.

Briefly recounting the facts, the Secretary states that this case involves a twenty to thirty ton roof fall, i.e., a fall of ground, about one month after the Secretary and the Contestant had agreed upon a support system to be used at Contestant's mine to control ground fall. (Sec. Exs. 5 & 6). That support system, however, failed to control the ground, as evidenced by the roof fall, which landed partially on a scaler being operated by one of Contestant's miners, who was performing his assigned task of scaling. The Secretary argues that given the numerous other cap rock and other roof falls in other areas of this mine, the extant support system did not control the ground as mining to cap rock and scaling was not adequate to insure miner safety. Consequently, the Secretary contends that the existing support system needs to be changed so that it will be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks.

With regard to the designation of the alleged violation as significant and substantial ("S&S"), the Secretary asserts that she satisfied all four prongs of the *Mathies* test. *See Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). Specifically, the Secretary argues that the above-described violation of the standard contributes to the discrete safety hazard of uncontrolled

ground and concomitant roof falls that are reasonably likely to hit and result in serious or fatal injury to a miner.

In sum, the Secretary requests that Order No. 8659953 and Citation No. 8659952 be affirmed.

B. The Contestant's Arguments

1. Contestant's Argument That the Secretary Had No Basis to Issue the Citation

The Contestant argues that the Secretary failed to adduce any evidence establishing the existence of any violation warranting the issuance of the Citation. Indeed, MSHA admitted that it issued the Citation not because Pattison committed any violation, but in an effort to undo the the ground control plan approved only four weeks earlier. Contestant asserts that apparently MSHA did not know what the appropriate procedural vehicle was for rescinding its approval of the plan, but issuing a baseless citation was not appropriate.

Contestant also argues that MSHA cannot cite an operator for a violation if the operator did not receive "fair notice of the agency's interpretation" of a standard. *Alan Lee Good*, 23 FMSHRC 995, 1005 (2001). Contestant notes that liability under 30 C.F.R. § 57.3360, a broad safety standard concerning the adequacy of particular roof support or other control, is resolved by reference to an objective standard of what action a reasonably prudent person familiar with the mining industry and protective purpose of the standard would have provided in order to meet the protection intended by the standard. *See Newmont Gold*, 20 FMSHRC at 1038 (quoting *Canon Coal Co.*, 9 FMSHRC 667 (1987)). "The safety standard must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Asarco, Inc*., 14 FMSHRC 941, 947 (1992) (citations omitted). As ALJ Cetti observed in *Newmont Gold*:

> [T]he fact that there has been a ground fall does not mean there has been any violation of regulatory requirements. Underground mining is an inherently dangerous activity. Conditions sometimes are such that despite the operator's best efforts, roofs fall. It has been stated many times that "even good roof can fall without warning."

20 FMSHRC at 1037-38 (*quoting Consolidated Coal Co.*, 6 FMSHRC 34, 37 (1984)).

Contestant argues that in this case, the Secretary had to do more than point to the fact that a roof fall occurred. Rather, to establish a violation, the Secretary must prove by a preponderance of the evidence that the roof support in place at 12AR on November 7, 2011, differed from "what a reasonably prudent person . . . would have provided in order to meet the protection intended by the standard." *Id*. Contestant claims that the Secretary never made such an offer of proof at the hearing, in fact, the exact opposite was shown. Specifically, at the time

of the roof fall, Pattison was operating under, and complying with, the MSHA-approved ground control plan in good faith. Tr. 36, 170, 173, 177, 236, 255. Applying the objective standard, Contestant argues that it would have been unreasonable for Pattison to do anything other than strictly comply with the agreed-to plan and MSHA's approval and Pattison's adherence should be *de facto* evidence showing no violation.

Moreover, Contestant argues that the Secretary failed to provide Pattison with any notice that Pattison was required to engage in some form of ground control above and beyond that required in the four week-old plan. Contestant relies on the following language from the judge's decision in *Beco Constr. Co., Inc.*, 23 FMSHRC 1182, 1190 (2001) (ALJ) to argue that once MSHA approved the ground control plan, it was precluded from issuing a citation for failure to have an "adequately designed, installed and maintained" ground control system, without first notifying Pattison that the plan was no longer sufficient.

> In this instance . . . the agency directly misled Beco Construction as to what is required. By accepting the fencing to abate a previous violation, MSHA gave notice to Beco Construction that the fence met the requirements of the safety standard. . . . With respect to the present citation, however, [a reasonably prudent person] would not have realized that a guard was required at the cited head pulley because MSHA previously accepted the fence to abate a guarding citation. MSHA is required to provide notice that fencing is no longer acceptable under the standard before a civil penalty can be assessed for the failure to have a guard at the cited location..

Contestant emphasizes that it is undisputed that Pattison was complying with the requirements of the agreed-to plan and that, prior to issuing the citation, MSHA failed to notify Pattison that the plan was no longer adequate to meet the requirements of 30 C.F.R. § 57.3360. Accordingly, Contestant argues that the Secretary's acceptance of the ground control plan was equivalent to assurance that as long as Pattison complied with the plan's requirements, Pattison would be compliant with the applicable safety standard.

In sum, Contestant argues that MSHA admitted it issued the citation to attempt to undo the imminent danger settlement or correct the ground control plan. Tr. 250-51. In addition, District Manager Richetta admitted his unfamiliarity "with how to address a plan that's in existence that is inadequate. I thought the way to do it would be through a citation. I don't know. Maybe there is another way to do it. I think the plan needs to be addressed. I don't know." Tr. 238. Given the agency's own uncertainty as to how to undo what it once agreed to, but now considers inadequate, Contestant argues that MSHA cannot claim that it gave "fair notice" of the alleged inadequacies and the citation must be vacated.

2. Contestant's Argument That the Secretary Had No Authority to Issue the 103(k) Order

a. The Argument That the 103(k) Order Does Not Meet the "Reasonableness" Standard of Review

Despite acknowledging my decision in *Pinnacle Mining Co.,* No. WEVA 2011-1758-R, 2011 WL 5894153, * 22 (Sept. 2011), which found that when MSHA denies approval of a coal operator's plan to modify a 103(k) order, the appropriate standard of review is an "arbitrary or capricious" standard, Contestant submits that the appropriate standard of review is a "reasonableness" test because the Court is not called upon to review "plan submissions requiring MSHA approval, i.e., Emergency Response Plans (ERPs), ventilation control plans, and roof control plans, [where] the Commission has applied an arbitrary and capricious standard of review." *Id*. at * 23 (*citing Emerald Coal Resources LP*, 29 FMSHRC 956, 965-66 (Dec. 2007)).[18] Contestant argues that issuance of the 103(k) order was unreasonable because no "accident" occurred, and even if there was an "accident," the Secretary failed to justify that the scope of the order was warranted given Pattison compliance with the approved plan. Contestant argues that section 103(k) restricts imposition of a control order to "affected areas" of a mine - here area 12AR, the location of the roof fall.

Even if "reasonableness" is not the applicable standard, Contestant argues that the Secretary failed to adduce evidence "show[ing] that 'the MSHA investigation team leader did not act in an arbitrary and capricious manner in deciding to issue the 103(k) order.'" *Clintwood Elkhorn Mining Co.*, 32 FMSHRC 1880, 1893 (Dec. 2010)(ALJ Gill) (*quoting Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), aff'd 111 F.3d 963 (D.C. Cir. 1997)). Contestant claims that this standard of review requires the Secretary to prove that her designated representative did not commit an abuse of discretion when it shuttered virtually all of Pattison's underground mine. *See Utah Power & Light Co., Mining Div*., 13 FMSHRC 1617, 1623, n.6 (Oct. 1991). Contestant notes that "[a]buse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Twentymile Coal Co.*, 30 FMSHRC 736, 765 (Aug. 2008) (opinion of Chairman Jordan and Commissioner Cohen). For

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[18] Contestant asserts that the roof and ventilation control plan-approval case law in the coal context is irrelevant and inapplicable here because in the coal context, specific regulations require operators to submit "Emergency Response Plans (ERPs), ventilation control plans, and roof control plans" to MSHA for pre-approval. MSHA personnel then review such plans, and if rejected, operators can challenge the MSHA decision-making process under an abuse of discretion standard. Contestant notes that such infrastructure and process does not exist in the metal and non-metal context. See Tr. 230-31, asserting that no other underground non-coal mines in the north central MSHA district have a roof control plan. Thus, Contestant argues that there is no value in analyzing coal-based case law in the roof and ventilation plan approval context, because that case law applies to inapposite facts and law.

the reasons that follow, Contestant argues that the Secretary abused her discretion when she issued the 103(k) Order.

b. Contestant's Argument That No "Accident" Occurred.

Contestant relies on Commission precedent requiring dismissal of a closure order issued pursuant to Section 103(k) of the Act when the order is not predicated on an "accident" as that term is defined by the Mine Act." *Aluminum Co. of America*, 15 FMSHRC 1821, 1827 (1993). Contestant notes that "accident," as defined by the Mine Act, "includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k).

Contestant notes that it is undisputed that none of these events occurred. Tr. 35. Rather, the parties stipulated there was a roof fall while a single miner, sitting in mechanical equipment with a cab that protected him, was scaling cap rock pursuant to the approved plan. Tr. 36. The parties further stipulated that the fall "was not at or above the anchorage zone in active workings where roof bolts are in use" (Stip. 7, Tr. 35) and that it "did not impair ventilation nor result in an entrapment for more than 30 minutes or entrapment that had a reasonable potential to cause death." (Stip. 9, Tr. 36). Contestant claims that the area in which the fall occurred was infrequently accessed only for scaling purposes (relying on Tr. 148), and because the approved plan was still being implemented in the area, Contestant claims that it had not resumed mining operations there. (relying on Sec. Ex. 5 at 1, the ground control plan.) Accordingly, Contestant argues that MSHA failed to establish that the area where the fall occurred was "active workings."

Contestant emphasizes that issuing inspector Hines told Pattison that the ground fall was not an immediately reportable event under 30 C.F.R. § 50.2, and argues, therefore, that no "accident" occurred. Tr. 37. Contestant questions how inspector Hines can determine that the roof fall was not an "accident" for mere reporting purposes, yet exercise virtually unfettered discretion to issue the 103(k) Order closing the mine based on the same roof fall.

Contestant argues that the Court must give effect to the plain language of the statute when clear and unambiguous. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43 (1984); *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Under the plain terms of 30 U.S.C. § 802(k), Contestant argues that no "accident" took place and the 103(k) Order must be vacated.

Contestant challenges the Secretary's argument that the word "includes" in Section 3(k) makes the accident definition "expansive" and the list of events non-exhaustive. Contestant also challenges her reliance on section 103(d), which states that "[a]ll accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator . . . ., " and any reliance on Part 50 reporting and recordkeeping regulations (30 C.F.R. 50.2(h)(8)), which define immediately reportable ground fall "accidents" as "[a]n unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage."

In this regard, Contestant argues that MSHA's investigation, reporting and recordkeeping regulations (which inspector Hines told Pattison were not triggered by the roof fall) cannot expand the limited congressional authority given to MSHA to close mines. Contestant argues that it is "[]permissible . . . to interpret an imprecise term differently in two separate sections of a statute which have different purposes." *Verizon California, Inc. v. Fed. Commc'ns Comm'n*, 555 F.3d 270, 276 (D.C. Cir. 2009) (*quoting Abbott Labs. v. Young*, 920 F.2d 894, 987 (D.C. Cir. 1990). Thus,"'[i]dentical words may have different meanings where . . . the conditions are different.' . . . Because of that possibility - different contexts dictating different interpretations - courts addressing the meaning of a term in one context commonly refrain from any declaration as to its meaning elsewhere in the same statute." *Id*. (emphasis added) (*quoting Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1437 (D.C. Cir. 1996)). *See also Bituminous Coal Operators' Ass'n, Inc. v. Hathaway*, 406 F.Supp. 371, 375 (W.D. Va. 1975), aff'd, 547 F.2d 240 (4th Cir. 1977). Indeed, as the D.C. Circuit explained in *Weaver*, identical words may have different meanings where "the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, **or the scope of the legislative power exercised in one case is broader than that exercised in another**." *Weaver*, *supra*, 87 F.3d at 1437 (D.C. Cir. 1996) (emphasis added) (*quoting Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

Contestant stresses that section 103(k) entrusts MSHA with tremendous authority to shut down a mine and deprive an operator of its property rights prior to obtaining due process. Conversely, section 103(d) and 30 C.F.R. § 50.2 require investigations and reports to be made only for certain roof falls. Based on the precedent cited, Contestant argues that it is reasonable to read the term "accident" to include certain roof falls in Section 103(d) and Part 50, but not to include anything other than the specifically enumerated items listed in 30 U.S.C. § 802(k). Indeed, Contestant asserts that it is unreasonable to read the statute any other way, particularly here where inspector Hines admitted that the roof fall was not even a "reportable" "accident."

Additionally, Contestant argues that the word "includes" in a statute is not necessarily "expansive." In *Oldja v. Warm Beach Christian Camps and Conference Center*, 79 F. Supp. 2d 1208, 1213 (W.D. Wash. 2011), the court contrasted a California statute which "broad[ly]" defined the term "common carrier" with the Washington statute which it held "is narrow and exhaustive." *Id*. at *4. The Washington statute stated: "'Common Carrier' includes all railroads, railroad companies…." *See, e.g,. Int'l Indus. Park, Inc. v. United States*, --- Fed.Cl. ---, 2011 WL 4684284, at *15 (Fed.Cl. Oct. 7, 2011) (emphasis added) (rejecting expansive reading of contract to include more items than those enumerated after word "includes" and stating "the word 'includes' does not only apply to exhaustive lists; sometimes it is used for non-exhaustive ones").

Contestant posits that the Secretary will rely on my decision in *Pinnacle Mining Co.*, Docket No. WEVA 2011-1758-R, 2011 WL 5894153 (Sept. 2, 2011), which in turn [cited] *Emerald Coal Resources, LP*, 30 FMSHRC 122 (2008) (ALJ Zielinski) for the proposition that a "roof fall" is an "accident" sufficient to trigger application of Section 103(k). But in *Emerald Coal Resources*, the judge relied upon the definition of "accident" in Section 103(d) and applied

it to Section 103(k), which Contestant claims is erroneous where, as here, one portion of the statute containing the defined term provides far greater power than the other portion of the statute containing the term.

Finally, Contestant argues thast even assuming *arguendo* that certain "roof falls" do constitute "accidents" sufficient to trigger section 103(k), the roof fall at issue here is not one of them. Indeed, Contestant notes that even the judge in *Emerald Coal Resources* noted that only "unplanned roof falls in active workings of a mine are accidents under section 103." *Emerald Coal Resources*, 30 FMSHRC at 124. In this case, Contestant claims that there is no dispute that the roof fall which occurred on November 7 did not occur in "active workings." Moreover, MSHA agreed that the ground fall that led to the 103(k) Order was not even an immediately reportable event under Part 50 as it was stipulated that inspector Hines told Pattison this. Tr. 37. Contestant asks, if the incident was not "reportable" how could it be an "accident?" Thus, even under the *Pinnacle* and *Emerald* [analysis], Contestant argues that no "accident" occurred and the 103(k) Order must be vacated.

c. Contestant's Argument That the Scope of the 103(k) Order, Which Virtually Shutters Pattison's Underground Mine, is an Abuse of Discretion

Contestant states that in evaluating whether MSHA has abused its discretion based on lack of evidence, the Commission has taken its analysis from the Supreme Court's decision in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing the explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Clintwood Elkhorn Mining Co., 32 FMSHRC 1880, 1893-94 (Dec. 2010)(ALJ Gill) (quoting *Twentymile Coal Co.* 30 FMSHRC 736, 754-55 (Aug. 2008) (opinion of Chairman Jordan and Commissioner Cohen) (*quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))), aff'd 111 F.3d 963 (D.C. Cir. 1997)); *see also Pinnacle Mining Co.*, 2011 WL 5894153, at * 23 (ALJ McCarthy)("While the scope of review under the 'arbitrary and

capricious' standard is narrow, [MSHA] must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made").

Considering the factual record framed against the factors outlined above, Contestant argues that MSHA abused its authority when it effectively closed the Pattison Mine "south of crosscut L." Although the Secretary's witnesses consistently asserted at trial that the 103(k) Order was issued to protect miners from ground control failure throughout the mine, Contestant claims that the Secretary adduced no evidence to suggest that such conditions existed throughout the mine or anywhere other than the location of the November 7 roof fall. Thus, even if validly issued for 12AR, Contestant asserts that the 103(k) Order is over broad.

i. Contestant's Claim That MSHA Failed to Analyze the Relevant Data

Contestant highlights inspector Hines' testimony that issuing the 103(k) Order to close Pattison's underground mine south of crosscut L was "the only option." Tr. 152-53. Contestant argues, however, based on Dr. Park's testimony, that the evidence adduced to justify the scope of the Order was limited to the Secretary's presumption that because one area of the mine supported by cap rock suffered a roof fall, other unknown and unexplored areas of the mine are similarly susceptible. Tr. 112 ("Q: . . . was the caprock involved in the November 7th roof fall atypical? A: . . . whether or not this caprock was different, I can't speak to that."). Contestant emphasizes that every cap rock fall prior to November 7, 2011 had been known to MSHA prior to its acceptance of the ground control plan adopted to resolve these very issues. For MSHA to question whether the approved plan was sufficient to deal with rock fall in November 2011 when all the evidence was before it in August does not compute, says Contestant. In any event, Contestant claims that areas of the mine where MSHA officials found evidence of prior roof falls were closed and not subject to active mining, and therefore present no hazard to miners, relying on Tr. 218, 221.

Contestant asserts that MSHA's failure to analyze relevant data and rely on an untested presumption is further illustrated by District Manager Richetta's testimony that after Pattison officials notified MSHA that a roof fall took place in 12AR, he became concerned that the ground control plan "apparently wasn't going to be working" because the incident took place in an area where cap rock support was in place. Tr. 233-34. Two days later, on November 9, 2011, MSHA issued the 103(k) Order "[b]ecause … the roof fall fell in an area of the mine that was relying on caprock as being the primary support. And we felt that this could occur anywhere else in the caprock where the scaler was going to be working, where they were going to be milling." Tr. 234. Contestant claims that this presumption was not supported by any additional evidence, other than previous observations by Richetta and a belief that "it appeared that this was the same type of fall in other parts of the mine." Tr. 235. Furthermore, Contestant asserts that Richetta could not point to any area of the mine where cap rock was actually in danger of collapsing. Tr. 251.

Contestant argues that Pattison's expert West offered evidence that completely discredits MSHA's theory. Unlike Dr. Park, who did not visit the mine to observe the ground control conditions after the roof fall, West visited the Mine on November 15, spent an entire day interacting with mine personnel, conducted an inspection and review of the ground conditions both underground and on the surface, and evaluated the geologic conditions against the extant ground control plan. Tr. 277-78, 281-82. Thus, after thoroughly reviewing the stratographic sequence in the ground above the cap rock in 12AR, and exploring scientific literature produced by sandstone mining experts regarding the geologic properties of cap rock in a sandstone environment, West concluded that the cap rock "is an excellent geotechnical material" that is "stable" and "really great material to excavate a hole in." Tr. 283-84.

Contestant notes that after conducting this thorough, technical, and data-driven analysis, West concluded that the ground control plan was sound (Tr. 291), and that MSHA erred in determining the cause of the roof fall and the scope of the 103(k) Order. (Tr. 286-87, "There seemed to be … uncertainty or indecision on the part of MSHA on what the problem was and what the cause of the problem was at the mine"). According to Contestant, West opined that MSHA erred because the agency's conclusions were "based on opinion rather than any substance." (citing Tr. 287, indicating that MSHA reports regarding the cause of the roof fall were not supported by data) (emphasis added)). West further testified that as a mining engineer, he liked to see numbers, but in reviewing MSHA's comments and conclusions regarding pillar sizing and pillar design, which Contestant argues formed the foundation for the agency's conclusions regarding the safety of cap rock throughout the mine, West "didn't see" numbers to support MSHA's reports. Tr. 287.

By contrast, Contestant relies on West's testimony that Pattison's experts conducted a vigorous and analytically sound evaluation regarding the strength of the cap rock throughout the mine, based on the standard safety factor of 1.4 for pillar strength in underground sandstone mines, and determined that the ground control plan's reliance on the strength of the cap rock was sound. Tr. 288-90. Contestant relies on West's further testimony that "Maochen [Assistant Professor at the University of Missouri, Rolla] took the MSHA technical support recommendations, actually calculated the existing pillar design layout, the pillar sizes and roadways at the mine . Even with low conservative strength values, he came up with a factor of safety of 1.7" Tr. 292. Contestant argues that this analytically driven conclusion not only rebuts the proposition offered by each MSHA witness, it undermines MSHA's justification underlying the scope of its 103(k) Order and illustrates a classic example of abuse of discretion in agency decision-making, which was never subject to a rigorous analysis of data and scientific principles.

ii. Contestant's Claim That MSHA Failed to Consider "the Gully"

Contestant also faults MSHA's analysis for failing to explain why a fall occurred at 12AR, but nowhere else. Contestant attributes such error to MSHA's failure to recognize the difference between cap rock present in 12AR and cap rock present throughout the rest of the mine. Contestant relies on West's conclusion that "the strength of the caprock [in 12AR was]

locally compromised by the presence of a gully on the surface topography," which allowed water or moisture to penetrate the cap rock and reduce its strength. Tr. 293. Contestant argues that this is important, because while cap rock in sandstone is initially strong, that strength deteriorates once water or "any sort of moisture" is introduced through either the surface of the stone, or when moisture is absorbed through the air. Tr. 286.

In this regard, West testified that cap rock "[a]s a sandstone, it's stable and exhibits pretty good strengths until it gets wet, and then it becomes extremely friable." Tr. 284. He further explained that cap rock is "one of these materials that, if you put a solid piece of rock and immerse it in water, in a very short period of time, it will disintegrate." Tr. 285. Contestant then argues, without record citation, that this "slaking" effect resulted from the presence of a gully above the surface rock, and ultimately degraded the caprock from a strong substance in 12AR to the point where the roof fall occurred there. Contrary to West's testimony above, Contestant then asserts on brief, without record support, that moisture alone does not impact the sandstone. If that were the case, contestant says there would be no mine. Rather, Contestant argues that there are other factors that interact with the moisture that cause potential problems - stresses from pillar, gradation, etc., and these items are already contemplated by the ground control plan. *See*, *e.g.*, Sec. Ex. 5, at 1, detailing requirements for addressing pillars with pinch-out deterioration or those that show signs of significant degradation.

Relying on West's testimony, Contestant next argues that the record evidence demonstrated without dispute that ground conditions in 12AR are unique, and not prevalent throughout the rest of the mine: "I think the 12 AR ground fall is unique to that location primarily due to the surface gully that you mentioned. This doesn't exist in these other areas. So the extrapolation of those factors to the rest of the mine <u>is a bit of a quantum leap</u>." Tr. 296. Contestant notes that MSHA failed to evaluate this factor, and claims that West described this factor as critical for determining what "was the main driver that caused" the roof fall in 12AR. Tr. 294.

Based on West's experience and testimony, Contestant argues that MSHA inappropriately drew a conclusion about the quality of cap rock throughout the mine by extrapolating results from the roof fall in 12AR. Tr. 295-96. Contestant further argues that this "quantum leap," which is akin to condemning an entire house for one faulty piece of drywall, fails to account for a significant factor contributing to the roof fall, and demonstrates an abuse of discretion.

Contestant notes that when MSHA does not consider actual evidence of a failure, other judges have invalidated a 103(k) Order as an abuse of discretion. Contestant relies on *Clintwood Elkhorn Mining Company*, 32 FMSHRC 1880 (Dec. 2010), where ALJ Gill held that MSHA's imposition of a 103(k) Order was arbitrary and capricious - and an abuse of enforcement discretion - because of "the way in which MSHA dealt with the evidence of brake failure in order to promote the theory of overloading." *Id*. at 1894. There, Judge Gill addressed MSHA's decision to impose a 103(k) Order, which attempted to regulate truck load limits without express regulatory authority to do so, after finding that MSHA ignored "clear and reliable evidence of brake failure or deemed it so unlikely as to not warrant mention in … any of the citations and

orders." *Id*. at 1895. Contestant notes that while the operator presented "clear and reliable" evidence that a truck rolled over pursuant to brake failure, and not overloading, MSHA officials refused to recognize brake failure as a potential cause of the incident and did not rebut such evidence. *Id*. at 1889 and 1895. Contestant cites the following passage from Judge Gill's analysis:

> There is no explanation why MSHA did not consider this evidence or factor it into its enforcement actions. Omission of the brake failure evidence impacts the assessment of the requirement that there be a rational connection between the facts found and the choices made. MSHA's decisions were not based on a consideration of the obvious relevant factor of brake system failure. This constitutes an unexplained and arbitrary failure to consider an important aspect of the problem.

Id. at 1895.

Contestant argues that a similar result is warranted in this case because MSHA failed to rebut or even consider West's conclusion that moisture from the gully caused the roof fall. Contestant notes that West personally observed the underground and surface mining conditions and concluded that cap rock failure caused by moisture-driven slaking in 12AR is not prevalent throughout the rest of the underground area impacted by the 103(k) Order. Contestant emphasizes that in stark contrast, MSHA did not even examine the surface area surrounding the mine.

iii. Contestant's Claim That the 103(k) Order is Implausible and Not Based on Agency Expertise

Contestant states that MSHA's ground control expert, Dr. Mark, has no expertise in sandstone mines or in ground control issues beyond the coal-mine environment. Tr. 67, 70. Contestant argues, therefore, that Dr. Mark, has no experience working in a sandstone mine, and no experience analyzing the particular rock formation and related dynamics unique to the sandstone mine environment. I have rejected these contentions, however, in my findings of fact at page 6, *supra*.

Furthermore, Contestant emphasizes that Dr. Mark did not visit the mine after the roof fall incident that preceded the 103(k) Order. (Tr. 100, "I have not been at the mine. I have not looked at this particular roof fall.") In fact, Contestant notes that Dr. Mark has not visited the mine since August 19, 2011, and could not recall the precise areas of the mine he traveled in during that visit. Tr. 107, 116. And, Contestant notes, it was following that visit that Dr. Mark [reluctantly, Tr. 98-99] recommended MSHA's agreement to the ground control plan.

Although Contestant concedes that Dr. Mark now has testified that something else should have been done, Contestant avers that he has absolutely no personal knowledge regarding the current condition of the mine or the specific conditions throughout the mine affected by the

scope of the 103(k) Order. Accordingly, Contestant argues that Dr. Mark's conclusions regarding the appropriate scope of the 103(k) Order are arbitrary and biased and, therefore, without merit, and that any MSHA justification of the 103(k) Order based upon Dr. Mark's purported "expertise" should be ignored.

iv. Contestant's Claim That the 103(k) Order Improperly Affects Unaffected Areas of the Mine

Contestant claims that the plain language of Section 103(k) restricts imposition of a control order to "affected areas" of the mine when an accident takes place. Contestant argues that reference to the overall construction of the Mine Act supports this understanding since in the context of an imminent danger under section 107(a), the Act only permits MSHA to impose a withdrawal order for the area affected by the alleged hazard. Contestant reasons that these provisions express Congress's desire to provide broad power to protect miners when MSHA recognizes a particular hazard, yet restrict the Agency's authority by limiting the power to order withdrawal to those areas actually affected by a specific hazard.

Contestant further argues that while Section 103(k) provides the Secretary with enormous power to usurp an operator's control of its private property, the Constitution mandates that this power cannot be unlimited, and the legislative history of the Mine Act supports this conclusion. Contestant cites Senate Report language that a "closure order closes a mine or a portion of the mine **affected by the particular condition or practice** to all but essential personnel until such time as the conditions or practices resulting in its issuance have been abated." *S. Rep. 95-181*, at 11 (1977) *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977* ("Leg. History"), at 617 (1978). In Contestant's view, this language suggests that Congress contemplated providing the Secretary with authority to issue a closure order under certain circumstances, but limited to those areas affected by a certain condition.

Even in an imminent danger scenario, which Contestant claims that MSHA knew it could not even allege in this matter (citing Tr. 153), the Secretary's authority is limited to closing the mine and withdrawing mine personnel from the areas affected. *S. Rep. 95-181*, at 35, *Leg. History* at 626. Contestant emphasizes that in the context of an imminent danger, Congress intended "that the Act give the necessary authority for the taking of action to remove miners from risk" in "situations where there is an immediate danger of death or serious physical harm." Yet, even in that dire circumstance, Congress still chose to limit that authority by instructing that an inspector "determine the affected area and issue a withdrawal order barring all persons . . . from such area." *Id*. at 625-26. Furthermore, Contestant notes that Congress made clear that "no temporary relief may be granted by the Commission from the issuance of such an [imminent danger] order," given "the importance of the imminent danger order as a means of protecting miners." *Id*. at 626. In this way, Contestant argues that Congress elevated MSHA's authority under Section 107 to respond to scenarios where an inspector encounters a dangerous situation, chose to restrict the Commission from granting operators temporary relief from imminent danger orders, and yet still restricted MSHA's authority to issue Section 107 orders to affected areas.

Accordingly, Contestant argues that it would make no sense to interpret MSHA's authority under Section 103(k) in a more expansive fashion when Congress clearly provided MSHA with less expansive authority - and more due process - under that section. Contestant avers that expanding that authority via judicial interpretation would controvert Congressional intent.

v. Contestant's Argument That MSHA Acted Unreasonably by Issuing A 103(k) Order That Obviates the Approved Ground Control Plan

Relying on precedent that involved a citation under 30 C.F.R. § 57.3360, but no concomitant 103(k) order, Contestant argues that it is the Secretary's burden to establish that the 103(k) Order meets the "objective standard of what action a reasonably prudent person, familiar with the facts and the protective purpose of the standard would have taken to provide the protection intended" by the order. *Newmont Gold Co.*, 20 FMSHRC 1035, 1038 (Sept. 1998) (ALJ Cetti)(*citing Canon Coal Co.*, 9 FMSHRC 667, 668 (1987). Thus, Contestant argues that MSHA's decision to issue the 103(k) Order affecting areas beyond 12AR should be vacated because it is unreasonable in light of the existing and recently approved ground control plan.

Contestant notes that MSHA accepted the plan, which retains all of the protective measures that MSHA agreed would sufficiently protect miners working throughout the mine. Although conceding that the plan contemplates that cap rock serve as one of many protective measures to support the roof throughout the mine, Contestant points out that the plan requires a great deal more, including a comprehensive approach to ground control that, on its face, contradicts the Secretary's assertion at trial that Pattison claimed cap rock alone would provide sufficient support throughout the mine. Tr. 237. Contestant cites language at the outset of the plan, which provides:

> Prior to resuming mining operations in each area, the mine will carefully examine, scale **or install additional support as needed in that area**, beginning with accessing the entries leading to and from the centrifuge location, which will be examined and scaled as needed to make them safe for conducting work…

(Sec. Ex. 5, at 1) (emphasis added).

Additionally, Contestant notes that the plan currently requires cap rock to be bolted and meshed where there is any indication that the cap rock has been compromised or is otherwise judged to be insufficient for support. *Id*. at 3. Contestant claims that the Secretary adduced no testimony that the plan, which Dr. Mark and others signed off on only four weeks prior to the instant fall in settlement of the 107(a) enforcement action, would not ultimately serve its intended purpose. Thus, Contestant argues it is unreasonable for MSHA to justify the 103(k) Order, which essentially prescribes a new ground control plan requiring bolting and meshing for all area south of crosscut L, when the existing, agreed-to plan already provides cap rock checks and balances.

d. In the Alternative, Contestant Argues That the Court Should Limit the Scope of the Section 103(k) Order

Finally, Contestant argues that Section 105(b) of the Mine Act is a "marvel of Congressional clarity" that "means what it says: temporary relief is available from any modification or termination of any order or from any issuance of an order under § 104." *Performance Coal Co. v. Federal Mine Safety and Health Rev. Comm'n*, 642 F.3d 234, 238-39 (D.C. Cir. 2011). Under *Performance Coal Company*, Contestant argues that this Court possesses clear delegated authority to modify the existing 103(k) Order.

If the Commission declines to vacate the 103(k) Order in its entirety, Contestant requests that the Commission modify and limit the scope of the 103(k) Order. In this regard, Contestant argues that the Secretary presented no evidence demonstrating that the areas beyond 12AR present dangerous conditions sufficient to justify the imposition of a closure order that eliminates a significant percentage of the mine's overall production and jeopardizes the mine's long-term production prospects and sustainability. Thus, Contestant's original request for temporary relief, in the alternative to vacating the 103(k) Order, was to amend the last two modifications of the 103(k) Order to limit the scope of the withdrawal to the area affected by the ground fall, i.e., 12AR, the only location where conditions were affected by the fall. In addition, Contestant asserts that while the fall that triggered the 103(k) Order was not related to, and was geologically unique from, the inactive areas where the Secretary's witnesses identified other falls at the hearing, Contestant does not object to maintaining those inactive areas, identified by the Secretary's witnesses at trial, as inactive, unless and until they are cleared by the Secretary for reopening.

e. Contestant's Emergency Motion to Modify 103(k) Order

i. Nature of Alleged Emergency

At the end of the hearing, the Court instructed the parties to "consult with your experts and see if you can sit down and make some revisions to this ground control plan that will permit you to get up and running as soon as possible" in a manner that is "as safe as possible." Tr. 345. Contestant states that as directed by the Court, it has been hard at work to undertake any and all efforts to investigate and abate any ground control issues at its underground mine, which effectively has been closed since November 9, 2011. To that end, Contestant asserts that Pattison, at considerable expense and cost, has continued to install bolts and additional ground support. At the same time, it has arranged for its experts West and Ge, to visit the underground mine on Monday, December 12-15, 2011. Contestant says that West is traveling a considerable distance for this work.

As of this emergency filing, however, MSHA has refused to permit either expert to conduct inspection or investigation in the mine or to undertake any effort to examine, evaluate or test ground conditions in the mine. As set forth in Exhibit A to its Motion, i.e., e-mail correspondence between owner Pattison and Richetta between December 1 and 7, 2011, MSHA

refuses to allow Pattison's experts to travel anywhere in the mine where the roof is not completely bolted and meshed. According to Contestant, MSHA is well aware that this effectively prohibits any real examination or evaluation of the roof. Thus, Contestant argues that emergency relief is needed immediately to allow these experts to conduct their work starting December 12, 2011.

ii. Factual Background for Emergency Motion

Following the hearing, per the Court's instruction to the parties, Contestant avers that it has attempted to work with MSHA to refine the original MSHA-approved ground control plan based on objective data regarding ground conditions in the mine. To that end, Contestant asked MSHA to modify the 103(k) Order to permit Pattison and its experts to: (1) thoroughly inspect all areas of the underground mine for potential rock deterioration and to identify options for instrumentation and monitoring sites previously inspected on December 2, 2011 by Pattison expert West and MSHA inspector Chris Lehman; (2) scale in each area to determine if any deterioration has occurred and apply shotcrete as necessary; and (3) install ground movement monitors in appropriate areas to develop precise data regarding the quality of the ground control conditions throughout the mine. In so doing, Pattison sought to gather facts and analyze the ground conditions throughout the mine to demonstrate which areas, if any, require additional ground control support above and beyond what is already required by the original plan.

Rather than agree to the proposal, or suggest an alternative, Contestant claims that MSHA summarily dismissed Pattison's proposal as "research oriented," and retrenched to its position that the only way the mine will be safe is if the entire underground mine has "8 feet of bolts with mesh." *See* Ex. A to Motion, e-mail from Richetta to Pattison dated December 7, 2011. Contestant claims that MSHA admitted at the hearing that ground conditions would not constitute an imminent danger to persons working in the mine since it lacked the evidence necessary to support any claim that ground conditions constituted an imminent danger. Tr. 153. Contestant asserts that MSHA's correspondence attempts to recreate facts and evidences its refusal to allow any further dialogue or discussion about the improper 103(k) order since MSHA expressed its belief "that is not possible to determine the stability of the roof at the Pattision Mine from visual observation," but Pattison never made such claim. *See* Ex. A to Emergency Motion.

In its response, MSHA also states that "Ground Movement Monitors are not an acceptable replacement for roof support in the Pattison Mine." *Id*. *See* Exhibit A. Contestant agrees and notes that it never made any claim to the contrary. Rather, Contestant says that its request is clear: it seeks to collect data and analyze data from the mine to further inform its evaluation and assessment of ground conditions and ground support measures.

In addition, Contestant essentially asserts that MSHA's contention that "at present we believe the most appropriate support pattern is the one developed by Pattison's rock mechanics consultant and described in Pattison's ground control plan, namely 8 ft[.] bolts with mesh" is simply false because Pattison's experts have never concluded that "the only way the roof can be 'made safe' is to install roof support," specifically "8 ft. bolts with mesh." Contestant asserts that

was not MSHA's position before it issued the 103(k) Order, that is not what the original MSHA-approved ground control plan required, and that has never been endorsed by Pattison's experts. Contestant asserts that MSHA's attempt to claim otherwise is nothing more than an effort to support its decision to bar any activity until the entire mine is bolted and meshed.

Contestant claims that MSHA's "bolt and mesh everything" position is based, at best, on an incomplete understanding of conditions in the mine, and it is abundantly clear that it will not revisit that decision for any reason, regardless of the facts. Worse, Contestant argues that MSHA is now doing everything it can to prevent Pattison from even collecting any data or information that could shed further light on conditions in the mine.

iii. Emergency Motion Argument

Contestant reasserts that the Commision may modify 103(k) orders issued by MSHA, *citing Performance Coal Co. v. Federal Mine Safety and Health Rev. Comm'n*, 642 F.3d 234, 238-39 (D.C. Cir. 2011). Contestant argues that the Commission should modify the scope of the existing 103(k) Order to permit Pattison's experts to enter the underground mine (south of crosscut L) for the limited purpose of: (1) installing instrument monitoring technology in areas where previous inspections by Pattison personnel have revealed no visible signs of deterioration, and (2) using that technology to develop a ground control instrumentation and data collection program that will allow production to continue in areas of the underground mine that are safely supported by adequate roof control measures. Contestant argues that these actions will allow the parties, in an effort to protect miners, to rely upon a more objective, data-driven analysis of actual conditions in the mine, rather than MSHA's factually unsupported conclusions regarding those conditions.

Contestant argues that modification is necessary because MSHA's position is, in essence, that Pattison may not enter the mine to obtain any data or information regarding the roof conditions. Contestant avers that MSHA's decisions to date regarding roof conditions and adequacy of roof support have not been supported by any objective data and MSHA is now working to ensure that such data will never even be collected or analyzed.

Contestant notes that in refusing to modify the 103(k) Order to permit the collection of such data, MSHA's December 7 correspondence claims that the potential value of collecting and analyzing such data is outweighed by the potential risk to those who would collect it, i.e., ["MSHA does not believe that proposed work plan justifies the exposure of individuals to the hazards of the unsupported roof at the Pattison Mine."]. Contestant argues that MSHA has no objective evidence that would quantify that potential risk, though it has [purportedly] admitted that ground conditions in the mine do not pose an imminent danger to miners working there. Tr. 153. Contestant notes that MSHA has permitted miners to enter the mine in order to install bolts and mesh, that bolting and meshing of the mine started several weeks ago, and that Pattison will continue with that work as long as MSHA allows it to continue. In these circumstances, Pattison asserts that it is hard to understand how the entry of Pattison's ground control experts to simply evaluate roof conditions and collect data puts them at risk.

Furthermore, Contestant argues that modification is necessary to prevent MSHA from bypassing the agency's limited grant of authority under Section 107 and 104, which together authorize operators to maintain personnel in a mine to abate an alleged imminent danger. *See* 30 U.S.C. §§ 817(a); 814(c) (prohibiting the Secretary from ordering withdrawal of personnel "whose presence … is necessary … to eliminate the condition described in the order"). Contestant reiterates that at trial, MSHA officials [purportedly] admitted that the agency lacked legal authority to issue an imminent danger withdrawal order under Section 107. *See, e.g.,* Tr. 153. Yet, Contestant argues, MSHA's enforcement posture throughout this case indicates that MSHA considers Pattison's ground support throughout the underground mine to be akin to an imminent danger. Thus, Contestant argues that MSHA appears to be claiming authority it does not have under Section 103(k), which provides MSHA authority to issue control orders immediately following a reportable "accident," with the full knowledge that Section 103(k) does not expressly permit operators to reenter a mine for abatement purposes without government permission.

Contestant says this action cries out for modification by the Commission. It argues that if the Commission sanctions MSHA's ability to reject reasonable operator requests for a modification of the 103(k) Order, it is sanctioning MSHA's imposition of completely, open-ended closure orders without the slightest bit of evidence of an imminent danger.

Surely, argues Contestant, Congress did not intend for MSHA to borrow section 103(k) authority to respond to allegedly dangerous conditions that are more appropriately governed by section 107, and in a manner that eviscerates an important operator right under section 107. Contestant concedes that Congress granted MSHA authority under 103(k) to investigate and respond to an accident. Contestant argues, however, that section 103(k) applies only to safety orders in conjunction with accident recovery plans, during an accident, or in its immediate aftermath, when an inspector is present. *See* 30 U.S.C. § 813(k).

Here, Contestant asserts, MSHA is not investigating an accident; it is merely imposing an abatement plan that is not founded upon analytical principles even though applicable ground control regulations do not provide it with authority to do so. Contestant argues that no miner needs recovery, no affected area of the mine needs recovery or return to normal (since the fall area is abandoned), and as illustrated at trial, MSHA cannot and has not produced a shred of credible evidence to suggest that conditions pose an imminent danger to miners in any specific area affected by the existing 103(k) Order. Consequently, Contestant argues that there is no ongoing "accident" at the Pattison Mine that requires the extreme measures MSHA has imposed - measures which are preventing Pattison experts from ascertaining precise insights into the mine's geological structure that will provide for a more objective, data-driven evaluation of conditions and the most appropriate ground control measures for the area affected by the section 103(k) Order.

In conclusion, Contestant moves the Commission to modify the existing 103(k) Order to permit an appropriate, expert-crafted abatement plan to take place.

IV. Discussion and Analysis

A. The 104(a) Citation is Vacated Because The Record Evidence Indicates That Contestant Lacked Fair Notice That It Was Violating 30 C.F. R. § 57.3360 After MSHA's Approval of Its Ground Control Plan

Initially, I reject Contestant's argument that analyzing roof and ventilation control plan-approval case law in the coal context is irrelevant and of no value in analyzing this non-metal contest proceeding. Such precedent is helpful by analogy.

I further reject any argument that Contestant's compliance with the MSHA-approved ground control plan in settlement of the imminent danger enforcement action is an absolute defense to a citation under 30 C.F.R. § 57.3360. *See Cumberland Coal. Res., LP v. Fed. Mine Safety & Health Review Comm'n*, 515 F.3d 247, 254 (3d Cir. 2008) (compliance with an approved ventilation plan pursuant to 30 C.F. R. § 75.370 was not a defense to a violation of 30 C.F.R. § 75.334(b)(1) because significant problems with the wraparound bleeder system, which was not designed for a longwall panel of unprecedented size, were so significant that operator was required to submit a revised plan after initial citation and was on notice that bleeder system was ineffective to satisfy protective purposes of the standard); *but see Plateau Mining Corp. v. Fed. Mine Safety & Health Review Comm'n*, 519 F.3d 1176, 1191-93 (10th Cir. 2008)(substantial evidence did not support ALJ and split-Commission findings that operator had notice that bleeder system, which was in compliance with MSHA-approved ventilation plan, was not functioning effectively as required to establish violation of regulation's mandatory standard where absence of any occurrence not anticipated by the plan indicates that there was nothing that should have put operator on notice that additional action, i.e., out-of-plan response, was necessary).

In short, the validity of the instant citation turns on whether the evidence presented establishes that a reasonably prudent person familiar with the mining industry and the protective purposes of the ground support use standard embodied in 30 C.F.R. § 57.3360 would have recognized that the MSHA-approved ground control plan was ineffective prior to the instant roof fall on November 7, 2011. *Cumberland Coal. Res., supra,* 515 F.3d at 255; *Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *see also Plateau Mining Corp*., 519 F.3d at 1192 (*quoting from Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). Like ventilation, roof control is a dynamic process and conditions not anticipated by the ground control plan may arise that would alert a reasonably prudent operator that an out-of-plan response is necessary, but the absence of any such condition indicates that there is nothing that should have put an operator on notice that additional action was necessary. *Plateau Mining Corp*., *supra*, 519 F.3d at 1197.

In *Canon*, the Commission vacated the citation where there had been no objective signs prior to the roof fall that would have alerted a reasonably prudent operator to provide additional support. 9 FMSHRC at 668. Similarly, in *Newmont Gold*, where expert David West also testified, the "Leaky Fault" that was the primary cause of the ground fall was subtle, variable and unpredictable and there was no evidence in the record to suggest that *prior to* the ground fall,

Newmont had any reason to believe that the Leaky Fault posed any threat to the integrity of the ground. *Newmont Gold Co.*, 20 FMSHRC 1035, 1039 (Sept. 1998) (ALJ Cetti).

As noted, the Secretary argues that unlike *Newmont Gold*, the conditions at the Pattison mine provided ample warning because Contestant's expert West found objective signs that existed prior to the roof fall that should have alerted Contestant of the need for additional roof support - specifically that "the strength of the cap rock has been compromised by the presence of a gully on the surface topography." Tr. 293. The Secretary argues that this finding substantiates the Secretary's position that the plan did not work and was in violation of the standard, despite approval of the plan and the fact that Contestant was not violating the plan.

In addition, while the Secretary disputes West's conclusion that the AR 12 ground fall was "unique to that location primarily due to the surface gully" (Tr. 296, *see also* Tr. 304-305), the Secretary argues that West acknowledged other roof falls and the possibility of roof falls throughout Contestant's mine, with concomitant harm to the health and safety of miners by testifying that he has seen specific areas of cap rock failure. Tr. 307. Further, West acknowledged that he would make modifications to the extant plan, including a better understanding of the air-slake process – the key to a lot of the roof failures – which would be facilitated by "some simple robust implementation." Tr. 310-311. The Secretary argues that this testimony is further evidence that an approved plan does not thereby become inexorably a plan that works and a plan that "is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon,* 9 FMSHRC at 668. Accordingly, the Secretary argues that Contestant can be in full compliance with the plan and still violate Part 57.3360, particularly since Contestant was well aware of the roof hazards at this mine.

I do not find the Secretary's arguments persuasive. Her contentions overlook the fact that West's expert services were retained by Pattison *after* the instant roof fall. Only then did West discover the gully and opine that it was the main driver contributing to the roof fall based on his post-fall investigation. Such knowledge cannot be attributed to Pattison before the instant fall. This is particularly so where MSHA's experts, including Dr. Park, examined the mine, and presumably should have noticed the gully, before the instant roof fall, but nevertheless approved Pattison's ground control plan.

The Secretary's arguments also fail to account for the fact that in *Newmont Gold*, like here, there was a history of prior ground falls. The credited testimony established that Newmont conducted an evaluation of the circumstances that led to the ground fall situation and modified its mining techniques and strengthened ground support in order to assure that ground falls based on similar circumstances would not occur in the future. 20 FMSHRC at 1048. Pattison did the same thing here after the August 2011 roof falls, and MSHA approved its ground control plan. Thereafter, the Secretary failed to provide Pattison with any notice that it was required to engage in some form of ground control above and beyond that required in the plan approved a month earlier.

The record further establishes that the roof where the November 7 fall occurred looked good. Tr. 144. As ALJ Cetti observed in *Newmont Gold*:

> [T]he fact that there has been a ground fall does not mean there has been any violation of regulatory requirements. Underground mining is an inherently dangerous activity. Conditions sometimes are such that despite the operator's best efforts, roofs fall. It has been stated many times that "even good roof can fall without warning."

20 FMSHRC at 1037-38 (*quoting Consolidated Coal Co.*, 6 FMSHRC 34, 37 (1984)).

Finally, District Manager Richetta candidly admitted that the citation was issued in an attempt to undo the imminent danger settlement or correct the ground control plan. ". . .The citation for 3360 is trying to undo the settlement or trying to correct the ground control plan . . ." Tr. 250-51. Further, Richetta admitted his unfamiliarity "with how to address a plan that's in existence that is inadequate. I thought the way to do it would be through a citation. I don't know. Maybe there is another way to do it. I think the plan needs to be addressed. I don't know." Tr. 238. In such circumstances, I agree with Contestant's argument that given MSHA's own uncertainty as to how to undo what it once agreed to, but now considers inadequate, Contestant was not given "fair notice" of the alleged violation.

In these particular circumstances, I conclude that the Secretary failed to prove by a preponderance of the evidence that the roof support in place at 12AR on November 7, 2011 differed from what a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Newmont Gold*, 20 FMSHRC at 1037-38. Accordingly, the record as a whole, does not establish a violation of the 30 C.F.R. § 57.3360. The section 104(a) citation is vacated, but the same does not hold true for the section 103(k) order.

B. The Section 103(k) Order was Validly Issued Because the November 7, 2011 Roof Was an "Accident" Within the Meaning of the Mine Act

The record evidence establishes that an "accident" occurred within the meaning of section 103(k). The plain language of Section 103(d) of the Mine Act specifies that an unplanned roof fall, except in abandoned panels or in areas inaccessible or unsafe for inspections, is an accident for purposes of section 103. *Emerald Coal Resources*, LP, 30 FMSHRC 122, 124 (Jan. 2008)(ALJ Zielinski). The November 7, 2011 roof fall did not occur in an abandoned panel or inaccessible area. In fact, the fall landed on the top of the scaling equipment being operated by a miner and caused extensive damage to the equipment. Tr. 144-45; Sec. Ex. 4. Accordingly, I find that an accident occurred which satisfies the precondition for issuance of an order pursuant to section 103(k). *Emerald Coal Resources*, *supra*, 30 FMSHRC at 124.

Alternatively, I find that the record evidence is sufficient to establish an accident occurred under the statutory definition of "accident" as interpreted by the Commission in

Aluminum Company of America, 15 FMSHRC 1821 (Sept. 1993). The term "accident" as set forth in Section 3(k) of the Act "includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k). In *Alcoa,* 15 FMSHRC at 1824, the Commission determined that the definition of accident in Section 3(k) was not exhaustive, because the word "includes" is a term of enlargement. The Commission agreed, in general, with the Secretary's argument in *Alcoa* that "an event not specifically listed . . . falls within the definition of 'accident' if it is similar in nature or presents a similar potential for injury or death as a mine explosion, ignition, fire or inundation," but concluded that whether a specific event is similar in nature must be determined on a case-by-case basis. 15 FMSHRC at 1825-26.

The 103(k) order in *Alcoa* was premised on a determination that a mercury contamination had occurred. While the Commission agreed with the Secretary that an injury or death occurring as a consequence of mercury exposure would constitute an "accident," the Commission found no evidence of overexposure to, contact with, or injury or illness arising from the presence of mercury. *See* 15 FMSHRC at 1825. The Commission further found that "[t]he Secretary presented no evidence . . . that the mercury contamination . . . was similar in nature or presented a potential for injury similar to that of a mine explosion, ignition, fire or inundation," i.e., "sudden events that pose an immediate hazard to miners and require emergency action." *Id*. at 1826. Furthermore, the Commission emphasized in *Alcoa* that "the Secretary's witnesses did not attempt to relate the hazards associated with the conditions in the area to an event similar to a mine explosion, fire or inundation . . . . and while an accident need not necessarily involve a sudden occurrence that creates an immediate hazard, the evidence in this case fails to support the Secretary's argument that this particular gradual release of a toxic chemical was similar in nature or presented the same potential for injury as the events set forth in the statutory definition of accident." *Id*. at 1827. The Commission rejected the Secretary's argument that an unplanned and uncontrolled release of mercury, including a gradual release that creates a long-term hazard, is an "accident" under the Mine Act, solely because the evidentiary record developed was insufficient to establish that the hazards associated with the conditions in the alumina hydrate production facility were similar in nature or presented the same potential for injury as a mine explosion, ignition, fire or inundation. 15 FMSHRC at 1827-28.

Applying this analysis here, I find that the instant roof presented a potential for injury or death similar to that of a mine explosion, ignition, fire or inundation. The record establishes that a unplanned roof fall or more than 30 tons occurred in an unbolted area mined up to cap rock and a portion of the fall landed on top of the scaling equipment being operated by a miner causing damage to the equipment and a near potential fatality. Commission precedent establishes that the deaths of most underground miners are caused by roof falls. *See e.g., Big Ridge, Inc.*, Docket No. 2009-532, Slip Op. at 19 (Mar. 1, 2011)(Judge Miller) (reaffirming Commission precedent in *Consolidation Coal Co.*, 6 FMSHRC 34, 37 n. 4 (Jan. 1984) that roof falls continue to be recognized by Congress, the Secretary of Labor, the Commission and the mining industry as one of the most serious hazards in mining and remain the leading cause of death in underground mines). In addition, unlike the evidentiary record in *Alcoa*, the Secretary's expert and other witnesses specifically established that the hazards associated with unsupported roof conditions

mined to cap rock presented the same potential for injury or death, much like a mine explosion, ignition, fire or inundation. Tr. 93, 100-01, 161, 168-69, 251, 253, 257.

Finally, given the central role that 103(k) control orders play in MSHA's statutory mission of advancing miner safety, *Clinchfield Coal Co.*, 8 FMSHRC 1310, 1311 n. 2 (Sept. 1986), I conclude that the term "accident" must be broadly construed to effectuate the Act's "primary purpose" of protecting miners. *See Sec'y of Labor o/b/o Bushnell v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989); 30 U.S.C. § 801(a); *Donovan o/b/o Anderson v. Stafford Contruction Co.,* 732 F.2d 954, 961 (D.C. Cir. 1984) (Mine Act must be broadly interpreted to further the congressional aim of making mines safe places to work.); *Sec'y of Labor v. FMSHRC (Jim Walter Resources)*, 111 F.3d 913, 920 (D.C. Cir. 1997); *Walker Stone Co., Inc. v. Sec'y of Labor*, 156 F.3d 1076, 1082 (10th Cir. 1998). Furthermore, to the extent that the statute is at all ambiguous, the Secretary's interpretation of the term "accident" must be accepted as long as it is reasonable. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 5 (D.C. Cir. 2003). Finally, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as her promulgation of a health and safety standard, and deserves deference. *Excel Mining*, 334 F.3d at 5.

In these circumstances, I find that the Secretary has demonstrated by a preponderance of the evidence that an "accident" has occurred under the Mine Act and that issuance of the Section 103(k) Order was appropriate.[19]

C. The Scope of the 103(k) Order Was Not An Abuse of Agency Discretion

Section 103(k) provides:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue

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[19] Although not necessary to my finding of an "accident" above, I note my factual finding, supra at p. 9, that the November 7 ground fall did impede passage and occurred in an active working area as the scaler was actively performing his assigned task. I further have noted that the parties' stipulations Nos. 7, 9 and 15 and are not broad enough to preclude this finding, Although MSHA inspector Jim Hines, during his November 7 inspection, told the mine operator that the ground fall was not an immediately reportable event under 30 CFR Part 50, *see* Stip. 15, I note that MSHA has defined "accident" in 30 C.F.R. 2(h)(8) disjunctively as ". . . ; or, an unplanned roof fall or rib fall in active workings that . . . impedes passage."

> such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

The initial question presented is the appropriate standard of review of a 103(k) Order. For the reasons set forth in my decision in *Pinnacle Mining Co.,* No. WEVA 2011-1758-R, 2011 WL 5894153, * 25-26 (Sept. 2011), I reject the operator's request to apply a reasonableness standard. Instead, I apply an arbitrary and capricious standard of review. As more fully explained in *Pinnacle Mining, supra,* this standard appropriately respects the Secretary's judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test. *Cf. Emerald Coal Resources LP*, 29 FMSHRC at 966. Moreover, under the Administrative Procedure Act, agency action is set aside when "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S. C. § 706.

In the context of this contest proceeding, this arbitrary and capricious standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in issuing the 103(k) order to encompass those areas underground that are south of crosscut L and not bolted or meshed, and in rejecting the Contestant's December 6 request to modify the Order to permit its experts to examine and evaluate conditions, install monitoring equipment and conduct tests, which is further discussed in section IV, E, below. Tr. 161, 236; Sec. Ex. 4; *see also* Contestant's Emergency Motion to Modify 103(k) Order. While the scope of review under the "arbitrary and capricious" standard is narrow, the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choices made. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)(citations omitted). Normally, agency action is considered arbitrary and capricious if the agency has relied on factors which Congress did not intend that it consider; *entirely* failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before it; or has taken a position so implausible that it cannot be ascribed to a difference in view or the product of agency expertise. *Id. (*italics added*); see also Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) ("abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law") (citations omitted).

As the Secretary points out, "[a] party seeking to have a court declare an agency action to be arbitrary and capricious carries 'a heavy burden indeed.' " *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738, 745 (D.C. Cir. 2001) (*quoting Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000)). That party must show that the agency has failed to consider relevant factors, *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), has made a clear error in judgment, *see id.*, or has failed to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,' " *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Thus, the arbitrary-and-capricious standard of review is "highly deferential" and "presumes the validity

of agency action." *City of Portland, Oregon v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (citations and internal quotation marks omitted).

This standard has not been met here. The Ninth Circuit has described MSHA's authority to manage accidents pursuant to Section 103(k) as one of "plenary power" and "complete control." *See Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983) ("[s]ection 103(k) gives MSHA plenary power to make post-accident orders for the protection and safety of all persons.") Contrary to Contestant's argument on post-hearing brief at 19, Section 103(k) does not restrict imposition of a control order to "affected areas" of the mine, i.e., 12AR, the location of the instant roof fall. As the undersigned suggested at the hearing, such an interpretation does not account for the language in section 103(k) that authorizes MSHA, after an accident, as found above, to issue such orders as it "*deems appropriate to insure the safety of any person* in the coal *or other mine*," and the operator shall obtain the approval of MSHA, when feasible, to ". . . *recover the coal or other mine* or return affected areas of such mine to normal." Tr. 27-31. The italicized language is broad enough to encompass the whole mine, including unbolted and unmeshed areas south of crosscut L, and certainly extends beyond the affected area of 12AR.

Further, MSHA's approval or disapproval of any plan to recover the mine is discretionary. As the D.C. Circuit has stated, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong., 25 (1977), *reprinted* in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Moreover, analogizing to Commission precedent in the ERP context, "[u]ltimately, the plan approval process involves an element of judgment on the Secretary's part." *Emerald Coal Resources LP*, 29 FMSHRC at 965, *citing Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("*Peabody II*"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *Id., citing C.W. Mining*, 18 FMSHRC at 1746; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable). Here, after the November 7, 2011 roof fall, MSHA has taken the position that it is unwilling to allow any work south of crosscut L that is not performed beneath a bolted and screened roof. Tr. 251-52; *see also* Ex. A to Emergency Motion at 1.

Contestant claims that in issuing the 103(k) Order, MSHA abused its discretion by failing to analyze relevant data, failing to consider the gully, failing to rely on Agency expertise, failing to limit the order to affected areas, and obviating the approved ground control plan. Alternatively, Contestant asks the Court amend the last two modifications of the 103(k) Order to limit the scope of the withdrawal to the area affected by the ground fall, i.e., 12AR. And, as this decision was readied for issuance, Contestant requests in its emergency motion that the Court order modification of the 103(k) order to permit its experts to examine and evaluate conditions, install monitoring equipment and conduct tests.

Based on the record evidence, the court is not persuaded by Contestant's motions and evidence that the Secretary abused her discretion in issuing the 103(k) order to encompass those areas underground that are south of crosscut L and not bolted or meshed, or in refusing to modify the 103(k) order to accommodate Contestant's post-hearing December 6, 2011 proposed work plan until such bolting and meshing occurs. The scope of the 103(k) order was based on the fact that the roof fell where mined to cap rock. Tr. 140, 159. In approving the ground control plan, MSHA reluctantly accepted Contestant's representations that roof mined to cap rock needed to be scaled, but needed no additional support, unless there were brows, potholes, or cap rock thickness of less than four feet. Tr. 98-100, 250; Sec. Ex. 5 at 2. None of those conditions were present where the roof fell on November 7 in what appeared to be good cap rock, as scaling occurred. Tr. 144. Given the instant roof fall and the mine's history of recent roof falls, including falls from roof mined to cap rock without brows, potholes, or cap rock less than four feet thick, MSHA made a reasoned judgment to reverse course from the approved ground control plan and consider bolting and meshing to be the best method to insure miner safety in areas south of crosscut L going forward. The court is not in a position to second guess that expert agency judgment, nor substitute its judgment for that of MSHA. *See Twentymile Coal*, 30 FMSHRC at 754-55, *quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983).

As the Supreme Court has recognized, an agency may change a past decision so long as there are reasons for the change and those reasons are rationally related to the agency's new decision. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 42-43 (1983).[20] Put differently, the standard for review of agency action requires deference to the reasonable decision of the agency in light of its expertise in the field. *Id.* Thus, the issue is not whether other more limited areas could have been encompassed by the 103(k) order, but whether the decision to extend the order to unbolted and unmeshed areas south of crosscut L was a rational one. *See id.* at 43. Based on the record before me, I conclude that MSHA's decision to reverse course was rationally related to evidence surrounding the November 7 roof fall and Contestant has failed to demonstrate a likelihood of success to show otherwise.

In this regard, since the fall occurred in roof that Contestant had represented was safest, MSHA rationally concluded that the safety of other roof in the mine south of crosscut L that was not bolted and meshed, some of which already had, or was scheduled to have, ground support, was dangerous. Tr. 236-37. Accordingly, an experienced MSHA inspector who was very

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[20]"[A]n administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes." *See, e.g., MSHA v. Tilden Mining Co., L.C.*, 33 FMSHRC 876, 880 (April 2011) (ALJ Paez), *citing NLRB v. Local Union No. 103, Iron Workers*, 434 U.S. 335, 351 (1978). Rather, the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the [law]." *Id., citing Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994).

familiar with the mine (Tr. 133), issued the section 103(k) order prohibiting all activity in areas south of crosscut L that are not bolted and meshed until an MSHA examination or investigation has determined that it is safe to resume mining operations in the affected area. Given the testimony, photographs, and/or documentary evidence regarding the November 7, 2011 roof fall, the August 2011 imminent danger order for roof fall, and the history of other recent roof falls in areas mined to cap rock, the Secretary rationally has demonstrated that Contestant's ground control plan is no longer deemed sufficient to protect the safety of any person working in underground areas south of crosscut L that are not bolted or meshed.

Even Contestant's expert West eventually conceded that the ground control plan should be revised to provide greater protection from failures resulting from moisture in the cap rock, i.e. air-slaking. In this regard, West testified that some of the roof fall failures could have resulted from moisture in the atmosphere moving into the cap rock, and that shotcreting should be bolstered in the ground control plan. Tr. 313, 316.

Based on the evidence of other roof falls in cap rock in other areas of the mine, I do not place much weight on West's testimony that the cap rock failure in the area of the instant roof fall (12 AR) was unique and likely resulted from the presence of the gully on the surface topography, some 60-70 feet away from the compromised area. West failed to testify with specificity about how he concluded that water from the gully reached the area of the November 7 fall and proximately caused the collapse. On the other hand, substantial record evidence, including West's own testimony, demonstrates that there is a moisture problem in the underground workings that extends beyond 12 AR and would cause cap rock in unbolted and unmeshed areas to become friable and subject to "air slaking," thereby creating an ongoing hazard of additional roof falls, the gully theory notwithstanding. Thus, West testified that while cap rock in sandstone is initially strong, that strength deteriorates and it becomes "extremely friable" once water is introduced or "any sort of moisture" is absorbed through the air, such as through the ventilation system within a mine. Tr. 284-86. West further testified that owner Kyle Pattison told him that the mine had an underground grain storage area, and if the moisture content of the grain reached a certain level, it would ferment and more moisture would be given off. Based on his conversation with Pattison, West testified that there were ground problems in the grain storage area associated with humidity brought in by the grain. Tr. 329.

Even Contestant admits on post hearing brief at 29, that while cap rock in sandstone is initially strong, that strength deteriorates once water or "any sort of moisture" is introduced through either the surface of the stone, or when moisture is absorbed through the air, citing West's testimony at Tr. 286, but omitting reference to mine ventilation system. Furthermore, MSHA's expert, Dr. Mark, confirmed on cross, that the cap rock does degrade over time through effective ventilation and humidity, necessitating frequent scaling to take down loose rock, however, scaling was an inappropriate engineering technique to eliminate the hazard of unpredictable rock falls at this mine. Tr. 121. Dr. Mark further confirmed some relationship between the stability of the cap rock, the potential for ground fall, and humidity. Tr. 123.

In these circumstances, I find that MSHA's failure to attribute significance to the gully does not make the scope of the order arbitrary and capricious. In fact, that Dr. Parks was aware

of the gully, when he replied on cross, "The little drainage creak that comes out and around there? I can't say that I did make specific notice of that." Tr. 119. Indeed, Dr. Mark knew that the gully on the surface was about 80 feet from the location of the November 7 roof fall. Tr. 120. Based on this testimony, I infer that Dr. Parks discounted any significance of the gully when he examined the mine in August. Rather, he credibly testified on cross that most professionals in the ground control field cannot pinpoint the cause of a ground fall, only that there are a combination of factors that either increase or decrease the probability of a roof fall occurring. Tr. 122.

Even though Dr. Marks did not examine the mine after the November 7 roof fall, I was persuaded by his expert opinion that it was proper for MSHA to focus in the 103(k) context on the ability to estimate what the probability of a ground failure is going forward, which is generally more reliable than a particular mechanism triggering failure. Tr. 122. In fact, on redirect, Dr. Mark confirmed that the issue is not whether MSHA understands all the mechanisms that took place in this particular fall, but whether it can identify specific features that will allow MSHA to identify other areas that are at higher risk. In this regard, Dr. Mark's recounted that MSHA knew that a 4-foot thick cap rock section fell in and could have caused a fatality and there is no evidence, that the properties of that cap rock are different from the cap rock elsewhere in the mine, but such cap rock is being relied upon to provide sufficient protection. Tr. 126. He testified, contrary to West, that it is pure speculation to suggest that because the roof fall happens be near some surface weakening factors in the ground, an overall stable structure can be created. Tr. 126-27. I find this expert testimony persuasive, particularly since West's contrary testimony was weak and speculative on proximate cause, i.e., "the presence of the gully on the topography which *might* allow the preferential ingress of water and moisture and cause an air-slake problem" (tr. 294), and his later testimony imprecise testimony on probing from the court that "[t]his [gully] has got something to do with it, the failure mechanism that we're seeing." Tr. 323.

I find expert West's gully theory unconvincing and too akin to the "Leaky Fault" theory in *Newmont Gold*, in which West also testified as an expert under questioning from the same law firm. The relationship between the Leaky Fault" theory that prevailed in *Newmont Gold* and the leaky gully theory in Pattison Mine, where West never established that the gully actually leaked into the affected area of the November 7 fall, is just too convenient for this judge to accept on the existing record. I find West's testimony contrived and I give more weight to Dr. Park's expert testimony that MSHA should consider the probability of a fatal roof fall given the instant roof fall and the history of prior roof falls in areas mined to cap rock, and to the opinions of MSHA's experienced inspector Hines and District Manager Richetta, whose testimony established that the ground control plan's reliance on cap rock did not work and was unsafe. Thus, based on the current roof fall and roof fall history in areas mined to cap rock, I conclude that MSHA was within its broad authority under section 103(k) to determine, contrary to Contestant's expert, that the ground control plan's reliance on the strength of the cap rock was no longer sound.

I further find Contestant's reliance on *Clintwood Elkhorn Mining Company*, 32 FMSHRC 1880 (Dec. 2010) (ALJ Gill) to be misplaced as that case is readily distinguishable.

There, a run-away truck jumped a berm and fell 110-150 feet when the brakes failed. The driver was not injured. In light of the absence of injury, the judge found no "accident" that triggered section 103(k). The judge also found that MSHA failed to prove that the truck was overloaded and that overloading was either a cause or contributing factor in the roll-over, as MSHA alleged. He further found that MSHA had no authority to regulate truck load weight limit and abused its discretion and acted arbitrarily when it conditioned the reopening of the prep plant on the use of data to regulate truck load weight. In addition, the judge found that the evidence of brake failure that MSHA refused to consider was "clear and reliable."

Here, by contrast, there was an "accident" triggering section 103(k), substantial evidence supports MSHA's determination that the ground control plan's reliance on unsupported cap rock did not work and was unsafe, and the evidence of the gully that MSHA apparently discounted was not clear and reliable, nor relied upon by Contestant prior to the contrived testimony of its expert on the issue at the hearing.

In sum, MSHA considered or discounted relevant data and articulated a satisfactory explanation for the scope of the 103(k), including a rational connection between the facts found and the choice made. I conclude that the scope of the 103(k) order was not arbitrary and capricious.

D. The Commission Has No Authority to Modify MSHA's 103(k) Order

Alternatively, Contestant asks the Court to amend the last two modifications of the 103(k) Order to limit the scope of the withdrawal to the area affected by the ground fall, i.e., 12AR, i.e., the only location where conditions were affected by the fall. Furthermore, as this decision was readied for issuance, Contestant requested in its emergency motion that the Court order modification of the 103(k) order to permit its experts to examine and evaluate conditions, install monitoring equipment and conduct tests.

Contestant cites no authority for the proposition that the Commission can modify a 103(k) Order. I find there is no such authority. A section 103(k) order is an enforcement action, not an adjudicatory action delegated to the Commission. Given the distinct enforcement and adjudicatory authority delegated to the Secretary and the Commission, respectively, neither the Commission nor its judges are authorized representatives of the Secretary under Section 103(k), and just as they do not have legal authority to charge an a operator with violations of the Mine Act by modifying a citation, I find that they likewise do not have the legal authority to modify a 103(k) enforcement order. *Cf. Conshur Mining, LLC*, Docket Nos. KENT 2008-562 and KENT-2008-782, slip op. at 10 (Nov. 28, 2011) (ALJ Feldman), *citing Consolidation Coal*, 20 FMSHRC 1293, 1298 (De. 1998), *quoting Mettiki Coal Corp*., 13 FMSHRC 760, 764 (May 1991).

Accordingly, the 103(k) order must either be vacated, or affirmed, as written and modified by MSHA. I have affirmed the scope of the 103(k) order, as modified by MSHA.

E. Contestant's Motion for Temporary Relief under 105(b)(2) and Emergency Motion To Modify 103(k) Order Are Denied

The Commission does have authority under section 105(b)(2) to grant temporary relief from any modification or termination of any order, including a section 103(k) order, or from any order under section 104. See *Performance Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 642 F.3d 234, 239 (D.C. Cir. 2011). Thus, while the Commission can grant temporary relief under Section 105(b)(2) of the Act from the modification or termination of a Section 103(k) order, it cannot grant temporary relief from the issuance of a Section 103(k) order, which is the relief initially sought by Contestant in this case. See my November 30, 2011 Order denying Contestant's motion for decision without briefing, and denying Contestant's motion for certification of my interlocutory ruling.

In its eleventh-hour Emergency Motion, Contestant again argues that the Commission should modify the scope of the existing 103(k) Order to permit Pattison's experts to enter the underground mine (south of crosscut L) for the limited purpose of: (1) installing instrument monitoring technology in areas where previous inspections by Pattison personnel have revealed no visible signs of deterioration, and (2) using that technology to develop a ground control instrumentation and data collection program that will allow production to continue in areas of the underground mine that are safely supported by adequate roof control measures. Essentially, this Motion again improperly seeks relief to modify the 103(k) Order, which the Commission is without authority to do. It does not seek temporary relief from modification or termination of the 103(k) order.

Moreover, even if I were to treat Contestant's Emergency Motion to Modify the 103(k) Order as a request for temporary relief from MSHA's failure to grant the requested modification on December 7, 2011, I find that Contestant's Emergency Motion does not satisfy the prerequisites for temporary relief under sections 105(b)(2)(A)-(C), as no hearing has been held in which all parties were given an opportunity to be heard on that issue, Contestant has failed to show a substantial likelihood that the findings of the Commission will be favorable to the Contestant based on the analysis herein, and Contestant has failed to show that such relief will not adversely affect the health and safety of miners. Rather, the Motion and its attached Exhibit A shows that MSHA weighed the risks and concluded that the proposed work plan does not justify the exposure of individuals to the hazards of the unsupported roof at the Pattison Mine. *See* Emergency Motion at Ex. A, p. 1.

In these circumstances, I cannot conclude that MSHA's failure to modify the 103(k) Order as requested by Contestant on December 6, 2001 was an abuse of discretion. MSHA informed Contestant that it was not possible to determine the stability of the roof at the Pattison Mine from visual observations. MSHA further determined, as experience has shown, that even roof that has been freshly scaled may suddenly collapse without warning, and MSHA reiterated its conclusions at the hearing that in its expert view, the only way that the roof can be "made safe" is to install roof support. While MSHA expressed a willingness to discuss alternative support designs for the future, at present, MSHA opined that the most appropriate support pattern is 8 ft. bolts with mesh. As MSHA represented, this bolt length is set forth in the ground

control plan. *See* Sec. Ex. 5 at p. 3, C. 4. In any event, even if Pattison's rock mechanics consultant never endorsed this approach, such argument does not undercut MSHA's expert view under its broad 103(k) authority, that such approach is needed going forward.

MSHA further asserted a reasonable belief that the proposed activities, as described, were "research oriented, " as two PhD students were to accompany the experts. *See* Emergency Motion at Ex. A, p. 3, December 2 e-mail from Pattison to Richetta. In addition, MSHA informed Pattison that Ground Movement Monitors are not an acceptable replacement for roof support in the Pattison Mine, and for such monitors to have any validity as warning devices, it is necessary to first collect data on the magnitudes and rates of roof movement that indicate impending collapse. MSHA opined that enough data must be collected so that the conclusions are statistically valid, and that no such data has been collected at Pattison to its knowledge, or from any other sand mine. Since the only possible purpose of the proposed Univ. Missouri work is to collect such data, MSHA concluded that it must be considered as research. Similarly, MSHA concluded that while studies of the mine design and ventilation issues are desirable, they do not address the immediate need for roof support at the mine.

In sum, MSHA rationally expressed its belief that the proposed work plan did not justify the exposure of individuals to the hazards of the unsupported roof at the Pattison Mine. *See* Emergency Motion at Ex. A, p. 1. Based on this record, I cannot conclude that MSHA's failure to modify the Order was an abuse of discretion.

ORDER

Based on the foregoing findings of fact and conclusions, Citation No. 8659952 is **VACATED.** Section 103(k) Order No. 8659953, as written and modified, is **AFFIRMED**. Contestant's motion to dismiss, or for temporary relief under 105(b)(2) is **DENIED.** Contestant's Emergency Motion to Modify 103(k) Order is **DENIED**, and to the extent it can be viewed as a request for temporary relief under section 105(b)(2) from MSHA's failure to grant the requested modification on December 7, 2011, it is also **DENIED**.

There is no interlocutory ruling to certify under Commission Rule 76.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 19, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 2011-242-M
	:	A.C. No. 08-00395-000240588
v.	:	
	:	Mine: Lake Wales Dry Plant
STANDARD SAND AND SILICA CO., Respondent	:	Mine ID: 08-00395

DECISION AND ORDER

Appearances: Benjamin A. Stark, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, S.W., Room 7T10, Atlanta, Georgia for Petitioner

Nichelle Young, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place. Suite D, Beltsville, Maryland for Respondent

Before: Judge McCarthy

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 (the "Mine Act"). At issue, is a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") under Section 104(a) of the Act alleging a violation of 30 C.F.R. §50.10, which provides:

> 30 C.F.R. § 50.10: The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll free number, 1-800-746-1553, once the operator knows or show know that an accident has occurred involving:
>
> (a) A death of an individual at the mine;
>
> (b) An injury of an individual at the mine which has a reasonable potential to cause death;
>
> (c) An entrapment of an individual at the mine which has a reasonable potential to cause death;
>
> (d) any other accident.

The parties filed cross-motions for summary decision and the following joint stipulation of facts:

1. At all times relevant to this matter, Respondent Standard Sand & Silica Co. ("Standard Sand") was the owner and operator of the Lake Wales Dry Plant (Mine ID# 08-00395) near Davenport, Florida in Polk County (the "Mine").

2. Standard Sand is engaged in mining operations in the United States, and its mining operations affect interstate commerce.

3. Standard Sand is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965 (the "Mine Act").

4. The Mine is a "mine" as that term is defined in § 3(h) of the Mine Act, 30 U.S.C. § 802(h).

5. The Mine is a surface metal/nonmetal mine.

6. The Mine is a milling operation which dries, screens and bags mined sand.

7. The Administrative Law Judge of the Federal Mine Safety and Health Review Commission has subject matter and personal jurisdiction over the dispute in this case.

8. L. Baylis Carnes owns Standard Sand.

9. Robert Lee Works was an employee of Standard Sand.

10. On May 20, 2010, at approximately 4:45 a.m., Mr. Works suffered a fatal heart attach while working at the Mine.

11. As of May 20, 2010, Mr. Works was 51 years old and had worked for Standard Sand approximately 19 years as a plant laborer.

12. On May 20, 2010, Mr. Works began his shift at the Mine at 12:00 a.m.

13. That night, Mr. Works was operating a manual sand bagging machine with help from two other employees of Standard Sand: Scott Grimes and Gilbert Gutierrez.

14. Mr. Works was operating the bagging machine while Mr. Grimes and Mr. Gutierrez were stacking filled bags of sand onto pallets.

15. When tanker trucks began to arrive at the Mine, Mr. Grimes and Mr. Gutierrez left to load the trucks with bags of sand. Mr. Works remained at the area near the bagging table.

16. At approximately 4:45 a.m., Mr. Gutierrez returned to the bagging table area and saw Mr. Works lying on the ground.

17. Mr. Gutierrez tried to rouse Mr. Works but could not get a response.

18. Mr. Gutierrez ran to get a face shield from the first-aid kit.

19. Mr. Grimes then returned to the bagging table area from the truck loading platform and saw Mr. Works on the ground.

20. Mr. Gutierrez performed cardiopulmonary resuscitation ("CPR") on Mr. Works.

21. Mr. Grimes called 911 while Mr. Gutierrez was performing CPR on Mr. Works.

22. After calling 911, Mr. Grimes called the plant manager, Weldon Till.

23. Mr. Gutierrez continued to perform CPR on Mr. Works until an ambulance arrived at approximately 4:55 a.m. on May 20, 2011.

24. Upon the ambulance's arrival, emergency medical technicians ("EMT's") took over CPR from Standard's employees.

25. A sheriff's department deputy arrived approximately four minutes later.

26. The EMT's performed CPR on Mr. Works at the plant for approximately 30 to 35 minutes before he was loaded into the ambulance.

27. The EMT's hooked Mr. Works up to a defibrillator.

28. Mr. Till arrived while the EMT's were performing CPR.

29. The ambulance left the mine at approximately 5:40 a.m.

30. According to the autopsy report, Mr. Works was pronounced dead at 6:06 a.m. on May 20, 2010.

31. The autopsy report found that Mr. Works suffered from atherosclerotic and hypertension heart disease, hepatomegaly, nephrosclerosis and pulmonary emphysema.

32. The autopsy report concluded that Mr. Works died as a result of atherosclerotic heart disease and that the manner of his death was "natural."

33. Standard Sand's Safety Director, Gordan Broadhead, called the Mine Safety and Health Administration ("MSHA") to report Mr. Works' death by heart attack at 7:12 a.m.

34. In response to this report, MSHA dispatched Inspector Robert Peters to investigate the incident.

35. In accordance with his authority under the Mine Act, Inspector Peters issued Citation 6599395, charging Standard Sand with a violation of 30 C.F.R. § 50.10(b) for failure to report to MSHA within 15 minutes an accident involving an injury at a mine that has reasonable potential to cause death.

36. Standard Sand's history of violations indicates 5 assessed violations at the Mine over 4 inspection days during the 15-month period prior to May 20, 2010, the date the citation was issued. Standard Sand's history at the Mine also indicates no prior violations of 30 C.F.R. § 50.10(b) during the same 15-month period.

37. Standard Sand's Quarterly Mine Tonnage or Hours Worked Report reflects 33,845 mine hours worked at the Mine in calendar year 2009. The same report reflects 86,599 total hours worked at all of Standard Sand's mines in calendar year 2009.

38. Standard Sand does not contend that it would be unable to continue business by payment of the assessed penalty in this case.

39. Because the violation at issue is a reporting violation, MSHA rated the gravity of the violations as follows: (a) probability of "no likelihood," and (b) severity of "no lost workdays." The citation is not rated as "significant and substantial."

40. Standard Sand demonstrated good faith in achieving rapid compliance after notification of the alleged violation.

41. MSHA rated the negligence of the violation as "high."

42. On May 20, 2010 Standard Sand was aware of the requirement in 30 C.F.R. § 50.10 to report accidents involving injuries at a mine that have a reasonable potential to cause death to MSHA at once without delay and within 15 minutes.

43. MSHA specially assessed a civil money penalty of $5,000, which is the minimum penally the Secretary may assess under § 110(a)(2) of the Mine Act, 30 C.F.R. § 820(a)(2), for failure to timely report a death at a mine or an injury at a mine that has a reasonable potential to cause death.

Brief Summary of the Parties' Arguments

A. Secretary of Labor

Petitioner argues that the stipulated facts establish that the Respondent failed to alert MSHA about an accident - an injury of an individual at the mine which has a reasonable potential to cause death - until at least an hour and 32 minutes had lapsed. This was 77 minutes past the deadline prescribed in the regulation. Therefore, the Secretary argues that the citation should be affirmed and the proposed penalty of $5,000.00 is the minimum penalty required by Congress for such a violation pursuant to the provisions of the Mine Act, 30 U.S.C. § 820(a)(2).

B. Standard Sand & Silica Co.

Respondent argues that it did not violate 30 C.F.R. § 50.10 because Mr. Works' heart attack was not an injury, but rather the result of a non-occupational illness from natural causes and not any work- related act. Consequently, Respondent argues that there was no "accident" within the meaning of 30 C.F.R. § 50.10, and thus no immediate reporting was required.

Discussion and Analysis

The Commission's rules provide that a "motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits show that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §2700.67(b). Based on the parties' joint stipulation and cross-motions, I find that there is no genuine issue of material fact presented and the stipulated facts are sufficient to render a decision on the legal issues raised in the parties' cross motions for summary judgment.

Although prior ALJ decisions are not controlling, I find that Judge Augustine's discussion in *E.S. Stone & Structure*, 33 FMSHRC 515 (Jan. 2011) (ALJ Augustine), which involved very similar facts, is particularly instructive and persuasive here. In that case, based primarily on undisputed facts that respondent's employees, in the presence of a supervisor, began performing CPR at 11:08 a.m. on a miner who had suffered a heart attack on the job; the fact that the heart attack victim was pronounced dead by the coroner at 12:05 p.m. that afternoon; and the fact that respondent made its first attempt to contact MSHA at 12:45 p.m., the judge found that respondent failed to comply with the requirements of 30 C.F.R. §50.10. In addressing those requirements, Judge Augustine noted the following:

> The Miner Act imposed a 15 minute time limit for reporting fatalities and serious accidents. 30 U.S.C. § 813(j). As a result, in March of 2006, MSHA issued an Emergency Temporary Standard ("ETS") which modified the language 30 C.F.R. § 50.10 where operators were previously required to "immediately" report fatalities and accidents, by imposing a 15 minute time limitation. 71 F.R. 12260. In the preamble to the ETS, MSHA stated that the "ETS does not change the basic interpretation of 30 C.F.R. § 50.10. By the terms of the provision, an operator is required to notify MSHA only after determining whether an "accident" as defined in existing paragraph 50.2(h) has occurred. This affords operators a reasonable opportunity to investigate an event prior to notifying MSHA. That is, mine operators may make reasonable investigative efforts to expeditiously reach a determination." *Id*. When the Final Rule on the amendment to this regulation (and others) was promulgated in December 2006, Section 50.10 was further modified and MSHA's preamble language explaining that the amendments to 50.10 still allow a "reasonable opportunity to investigate an event prior to notifying MSHA" was removed. The preamble also clarifies, in a manner consistent with Commission case law, that *incidents requiring cardio-pulmonary resuscitation (CPR) constitute "injuries which have a reasonable potential to cause death.*" 71 F.R. 71434. *See Cougar Coal*, 25 FMSHRC 513 (September 5, 2003)(italics added).

33 FMSHRC at 519.

Based on the stipulated facts, Judge Augustine concluded that respondent knew it had experienced a reportable accident arguably at 11:23 a.m. (fifteen minutes after CPR was initiated) and conclusively at 12:20 p.m. (fifteen minutes after the official pronouncement of death). The judge agreed with MSHA's designation that the violation was non-S&S, but did not agree that respondent demonstrated moderate negligence. Emphasizing that respondent quickly implemented and exhausted life-saving efforts, conducted a prompt assessment/investigation into the situation, and then immediately proceeded to contact MSHA, he modified the operator's negligence from "moderate" to "low." *Id*. at 520.

Similarly, in this case, the following facts are undisputed. On May 20, 2010, Mr. Till, the plant manager, arrived while the EMTs were performing CPR on Mr. Works, who had suffered a heart attack on the job. The EMTs performed CPR on Mr. Works for approximately 30 to 35 minutes before Mr. Works was loaded into the ambulance. The ambulance left the mine at approximately 5:40 a.m. Mr. Works was pronounced dead at 6:06 a.m. that same morning. Respondent did not make its first contact with MSHA until 7:12 a.m.

In these circumstances, I find that Respondent failed to comply with the requirements of 30 C.F.R. § 50.10. Respondent knew or should have known that it had experienced a reportable accident arguably at about 5 a.m. (fifteen minutes after CPR was initiated by Mr. Gutierrez, while Mr. Grimes called 911 and plant manager Till), more definitively at 5:10 a.m.

(approximately 15 minutes after the ambulance arrived and the EMTs took over CPR functions), and conclusively at 6:21 p.m. (fifteen minutes after the official pronouncement of death). I agree with MSHA's designation that the violation was non-S&S, but do not agree that Respondent demonstrated high negligence. Like the respondent in *E.S. Stone*, Respondent quickly implemented and exhausted life-saving efforts, contacted 911 and the plant manager, conducted a prompt assessment at the scene, and contacted MSHA reasonably promptly, although not immediately, after learning of the death. In these circumstances, I modify the operator's negligence from "high" to "moderate."

Penalty

Respondent, as operator of the Mine has failed to provide timely notification to the Secretary as required under section 103(j) (relating to the 15 minute requirement), and therefore shall be assessed a civil penalty by the Secretary of not less than $5,000 and not more than $60,000. See section 110(b)(2) of the Mine Act. The Secretary has assessed a proposed penalty of $5,000, the statutory minimum for the violation.

Under section 110(i) of the Act, "the Commission shall have authority to assess all civil penalties provided in this Act." 30 C.F.R. § 820(i). Although the Secretary issues citation and orders under the Act and proposes civil penalties, it is the Commission that is responsible for assessing civil penalties and providing other appropriate relief. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-91 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The Commission's assessment of penalties is a *de novo* determination based on the six statutory criteria specified in section 110(i) of the Act. Section 110(i) of the Act requires the Commission to assess civil monetary penalties considering: (1) the operator's history of previous violations, (2) the size of the business, (3) the level of negligence by the operator, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

The stipulations state that Standard Sand's history of violations indicates 5 assessed violations at the Mine over 4 inspection days during the 15-month period prior to May 20, 2010, the date the citation was issued. Standard Sand's history at the Mine also indicates no prior violations of 30 C.F.R. § 50.10(b) during the same 15-month period. I have found that Respondent exhibited moderate negligence because it quickly implemented and exhausted life-saving efforts, contacted 911 and the plant manager, conducted a prompt assessment at the scene, and contacted MSHA reasonably promptly, although not immediately, after learning of the death. The Respondent has stipulated that the penalty will not affect its ability to stay in business. The violation was determined to be non-S&S and there was no likelihood that an injury or illness would result from the violation. Standard Sand demonstrated good faith in achieving rapid compliance shortly after the failure to immediately report the accident. According, the penalty proposed by Petitioner of $5,000.00 for Citation No. 6599395 is affirmed.

Order

Based upon the foregoing findings of fact, discussion and analysis, it is **ORDERED** that Citation No. 6599395 be **AFFIRMED, AS MODIFIED,** with a penalty of $5,000.00, which shall be paid by Respondent within thirty (30) days.

/s/ Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

Distribution: (E-Mail and Certified Mail)

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/ld

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 20, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-10-M
Petitioner	:	A.C. No. 15-18478-162708
	:	
v.	:	
	:	Mine: Apex Quarry, LLC
APEX QUARRY, LLC,	:	
Respondent	:	

DECISION AND ORDER

Appearances: Angele Gregory Esq., and Elizabeth L. Friary, Esq., U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee for Petitioner

Todd Harris, *pro se*, White Plains, Kentucky for Respondent

Before: Judge McCarthy

This case is before me upon a petition for civil penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 (the Mine Act), charging Respondent, Apex Quarry, LLC (Apex) with seven section 104(a) significant and substantial[1] violations of mandatory safety standards and seeking a total civil

[1] A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); see also *Buck Creek Coal, Inc. v. FMSHRC,* 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). The Commission has further found that "an inspector's judgment is an important element in an S&S determination." *Mathies*, 6 FMSHRC at 5 (*citing Nat'l Gypsum*, 3 FMSHRC at 825–26); *see also Buck Creek Coal*, 52 F.3d at 135–36 (stating that ALJ did not abuse discretion in crediting opinion of experienced inspector). An evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130

(continued...)

penalty of $19,632.00 for those violations. At the hearing on June 21, 2011, the parties stipulated to certain amended citations and stipulated that Respondent would accept other citations as written. With regard to the amended citations, the Secretary agreed to reduce the proposed penalty amounts in accordance with the formula set forth in 30 C.F.R. Part 100.3 of the Mine Act. Tr. 3 Respondent, through its *pro se* owner, Todd Harris, admitted the violations and the findings relating thereto, as modified at the hearing or as originally written, and challenged only the amount of civil penalties proposed by the Secretary in the seven citations at issue, claiming that it was unable to pay them and remain in business.

Citation Number 7752070

This citation alleges a violation of the standard at 30 C.F.R. § 56.14130(i) and charges as follows:

> The mine operator has not maintained the seat belt in the Caterpillar 988B FEL. The four inch wide seat belt is torn in half on the female side of the waste strap. The front end loader is presently being used to load customer trucks from the stock pile area. This condition creates a hazard of a miner not being properly restrained within the operator's station of the front end loader.

The cited standard, 30 C.F.R. § 56.14130(i), provides that "[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance."

The citation is alleged to be significant and substantial, with one person affected, and moderate negligence. The gravity of the original citation was modified at the hearing from reasonably likely to result in an injury that could be fatal to reasonably likely to result in an injury that could be permanently disabling. The parties stipulated to the findings in the citation, as modified. Based on the gravity modification from fatal to permanently disabling, the proposed penalty amount was reduced from $2,106 to $946. Tr. 8-9.

Citation Number 7752071

This citation alleges a violation of the standard at 30 C.F.R. § 56.14101(a)(2) and charges as follows:

> The parking brake provided on the Caterpillar 988B FEL is not maintained in a functional condition. When tested on the maximum grade of travel the parking brake would not hold the front end loader in place. The front end loader is presently being used to load customer trucks from the stock pile area. This condition creates a hazard of a miner being struck by/ran over by moving equipment.

---

[1](...continued)
(Aug. 1985) (*quoting U.S. Steel Mining Co., 6 FMSHRC* 1573, 1574 (July 1984)).

The cited standard, 30 C.F.R. § 56.14101(a)(2), provides that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment wit its typical load on the maximum grade it travels."

The citation is alleged to be significant and substantial, with one person affected, and moderate negligence. The gravity of the original citation was modified at the hearing from reasonably likely to result in an injury that could be fatal to reasonably likely to result in an injury that could be permanently disabling. The parties stipulated to the findings in the citation, as modified. Based on the gravity modification from fatal to permanently disabling, the proposed penalty amount was reduced from $2,106 to $946. Tr. 9-11.

Citation Number 7752073

This citation alleges a violation of the standard at 30 C.F.R. § 56.14103(A) and charges as follows:

> The bottom portion of the front wind shield on the Caterpillar 235 excavator is broken and cracked for it's entire portion. The excavator is normally used at the strip area of the mine to remove overburden material. Also inside the operator's station of the excavator the glass has created ruff and sharp edges. This condition creates a hazard of a miner having poor visibility of operation of the machine.

The cited standard, 30 C.F.R. § 56.14103(a), provides that "[i]f windows are provided on operators' stations of self propelled mobile equipment, the windows shall be made of safety glass or material with equivalent safety characteristics. The windows shall be maintained to provide visibility for safe operation."

The citation is alleged to be significant and substantial, with one person affected, and high negligence. The gravity of the original citation was modified at the hearing from reasonably likely to result in an injury that could be fatal to reasonably likely to result in lost work days or restricted duty. The parties stipulated to the findings in the citation, as modified, but agreed to leave the citation as significant and substantial. Based on the gravity modification from fatal to lost work days or restricted duty, the proposed penalty amount was reduced from $6,996 to $2,106. Tr. 11-12.

Citation Number 7752074

This citation alleges a violation of the standard at 30 C.F.R. § 56.11001 and charges as follows:

> Safe access is not provided to the operator's station of the "older" Wabco haul truck. The second step upon (within the truck's bumper) is bent out of shape, making it difficult to get up to the operator's station. This truck is used on a regular basis to haul material from the

> pit area to the plant area of the mine. This condition creates a hazard of a miner slip/ trip/ falling off the truck and onto the ground.

The cited standard, 30 C.F.R. § 56.11001, provides that "[s]afe means of access shall be provided and maintained to all working places."

The citation is alleged to be significant and substantial, with gravity reasonably likely to result in lost work days or restricted duty, one person affected, and high negligence. The parties stipulated to the findings in the citation, but agreed to modify negligence from high to moderate. Based on the negligence modification, the proposed penalty amount was reduced from $2,106 to $635. Tr. 35.

Citation Number 7752075

This citation alleges a violation of the standard at 30 C.F.R. § 56.14132(a) and charges as follows:

> The back up alarm provided on the "older" Wabco haul truck is not maintained in a functional condition. When tested the alarm would not sound. The truck is used on a regular basis to haul material from the pit area to the plant area. This condition creates a hazard of a miner being struck by/ ran over by moving equipment.

The cited standard, 30 C.F.R. § 56.14132(a), provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

The citation is alleged to be significant and substantial, with gravity alleged to be reasonably likely to result in an injury that could be fatal, one person affected, and moderate negligence. At the hearing, Respondent agreed to accept the citation, as written. Tr. 32. Accordingly, the proposed penalty of $2,106.00 remains unchanged. Tr. 15.

Citation Number 7752076

This citation alleges a violation of the standard at 30 C.F.R. § 56.14132(a) and charges as follows:

> The manually operated horn on the "newer" Wabco haul truck is not maintained in a functional condition. When tested the horn would not sound. The truck is normally used to haul material from the pit area to the plant area. This condition creates a hazard of a miner being struck by/ran over by moving equipment.

The cited standard, 30 C.F.R. § 56.14132(a), provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

The citation is alleged to be significant and substantial, with one person affected, and moderate negligence. The gravity of the original citation was modified at the hearing from reasonably likely to result in an injury that could be fatal to reasonably likely to result in an injury that could be permanently disabling. The parties stipulated to the findings in the citation, as modified. Based on the gravity modification from fatal to permanently disabling, the proposed penalty amount was reduced from $2,106 to $946. Tr. 16-17.

Citation Number 7752077

This citation alleges a violation of the standard at 30 C.F.R. § 56.14132(a) and charges as follows:

> The back up alarm equipped on the Mack Super Liner water truck is not maintained in a functional condition. When tested the alarm would not sound. The truck is used on a regular basis to water road ways at the mine and to wash out material around the plant area. This condition creates a hazard of a miner being struck by/ ran over by moving equipment.

The cited standard, 30 C.F.R. § 56.14132(a), provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

The citation is alleged to be significant and substantial, with gravity alleged to be reasonably likely to result in an injury that could be fatal, one person affected, and moderate negligence. At the hearing, Respondent agreed to accept the citation, as written. Tr. 32. Accordingly, the proposed penalty of $2,106.00 remains unchanged. Tr. 18.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violations, the size of the operator, the gravity of the violation, whether the violation was abated in good faith, and whether the penalties would affect the ability to continue in business.

The Secretary's undisputed representations in her petition establish that Respondent is small in size and has a moderate history of prior violations. There is no dispute that the violations herein were abated in good faith. The gravity and negligence of the violations have been admitted by Respondent and have previously been discussed.

As noted, the Respondent claims only that the civil penalties proposed by the Secretary would affect its ability to remain in business. This Commission has held that the mine operator has the burden of proving such a claim. *Sellersburg Stone Co.,* 5 FMSHRC 287, 294 (Mar. 1985).

At the end of the hearing, after questioning of Mr. Todd Harris by the Court (Tr. 40-52), and cross examination by the Secretary (52-54), I left the record open so that Respondent could submit the following documentation, referred to in testimony, as requested by the Court:

- audited financial statements for Apex Quarry, LLC;
- evidence of an IRS tax lien;
- evidence of a Kentucky State Treasury Department tax lien;
- the operating agreements for Apex Quarry, LLC with Mr. Leslie E. Strong and Mr. David L. Roberts; and
- the legal document that governs the relationship between Todd Harris Excavating, LLC and Apex Quarry LLC.

See Tr. 48, 51-52, 54-55.

The Court specifically advised Mr. Harris, based on Judge's Melick's decision in *Johnco Materials, Inc*., Docket No. SE 2009-994M, slip. op. at 4-5 June 8, 2011 (ALJ Melick), that audited financial statements were required to meet his burden of proof, and Mr. Harris agreed to provide them. Tr. 38-39, 54-55. Despite the fact that the record was left open to permit Respondent to provide audited financial statements, Respondent failed to do so.

Respondent provided a host of documents establishing past legal difficulties, judgments and liens, but provided only unaudited tax returns from 2008, 2009, and 2010, prepared by certified public accountants Bruce & Company, PSC, "*without verification*." Furthermore, Respondent provided minimal, unaudited financial statements, limited to an Apex Quarry, LLC profit and loss statement from January through July 18, 2011, which shows ordinary income at a loss of (-$4,676), and an Accounts Receivable (A/R) Aging Summary through July 18, 2011 showing accounts receivable of $16, 912.[2] Moreover, although Respondent has significant taxable losses for 2008, 2009, and 2010, these losses are carried over to subsequent years and may offset any increase in Respondent's net operating income going forward. Further, it appears that Respondent's continued operation of its mining business has allowed it to continue making payments to significant other creditors, at least on an installment basis. In these circumstances, in the absence of audited financial statements, I find that the Respondent has failed to sustain its burden of proving that the total reduced penalty of $9,791, particularly if payable on an extended installment basis, would affect its ability to remain in business.

[2] The documents provided by Respondent have been marked for identification and included in the record as R. Ex. 1.

ORDER

Citation Numbers 7752070, 7752071, 7752072, 7752073, 7752074, 7753075, 7752076, and 7752077 are **AFFIRMED, AS MODIFIED**, and Apex Quarry, LLC is ordered to pay a total reduced penalty of $9,791 in 60 equal installments of $163.18, beginning on February 1, 2012 and the first day of each successive month until paid in full. If Respondent misses a payment, the total unpaid balance will immediately become due and payable.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution: (E-Mail and Certified Mail)

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/ld

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December 20, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2009-195 A.C. No. 36-05018-168539
v.	:	Mine: Cumberland Mine
CUMBERLAND COAL RESOURCES LP, Respondent	:	
CUMBERLAND COAL RESOURCES LP, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. PENN 2009-100-R Order No. 7067830; 10/07/2008
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Mine ID: 36-05018 Mine: Cumberland Mine

DECISION

Before: Administrative Law Judge John Kent Lewis

Appearances: Patrick M. Dalin, Esq., United States Department of Labor, Office of the Solicitor, Region III, 170 S. Independence Mall West, Suite 630E, The Curtis Center, Philadelphia, PA 19106

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, 401 Liberty Avenue, Suite 1340, Pittsburgh, PA 15222

STATEMENT OF THE CASE

A hearing in this civil penalty proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq., (the "Mine Act"). This matter concerns an alleged violation of the mandatory safety standards 30 C.F.R. § 75333(b)(1) and 30 C.F.R. § 75.333(h). Order No. 7067830, citing a violation of section 104(d)(2), was served on

Respondent on October 7, 2008. Respondent filed a pre-penalty contest with respect to Order No. 7067830 on November 3, 2008. The alleged violation was found to be significant and substantial ("S&S") in nature, as well as an unwarrantable failure to comply with mandatory safety standards. On January 26, 2010, the Secretary filed a petition to assess a $30,288.00 penalty for the one violation. A hearing was held in Pittsburgh, Pennsylvania on June 14, 2011, and the parties participated fully therein. The parties later submitted post-hearing briefs.

STIPULATIONS AT HEARING

1. Cumberland is an "operator" as defined in §3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter the "Mine Act"), 30 U.S.C. § 803(d), at the coal mine at which the orders at issue in this proceeding were issued.

2. Operations of Cumberland at the Cumberland Mine ("the Mine"), at all times relevant hereto, were subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to Sections 105 and 113 of the Mine Act.

4. A true copy of Order No. 7067830 was served on Cumberland or its agents as required by the Mine Act.

5. The individual whose signature appears in Block 22 of the Order at issue in this proceeding was acting in the official capacity and as an authorized representative of the Secretary of Labor when the Order was issued.

6. The total proposed penalty for the orders in this proceeding will not affect Cumberland's ability to continue in business.

7. The appropriateness of the penalty, if any, to the size of Cumberland's business should be based on the fact that in 2007, Cumberland, the operator of the mine, mined 7,264,244 tons of coal from the mine, and that, in 2007, the controller of the mine mined in excess of 10,000,000 tons of coal.

8. Cumberland was assessed a total of 325 citations based on 943 inspection days in the fifteen months immediately preceding the issuance of the order in this case.

9. The Secretary's copy of Order No. 7067830 is an authentic copy of the order at issue in this preceding, and may be admitted into evidence for the purpose of establishing their issuance.

10. For the purposes of a finding with respect to a "clean" inspection, in Order No. 7067830, the initial action is identified as Order No. 7025409 issued on October 4, 2007. The MSHA website shows twenty-one other Section 104(d) enforcement actions during

this period between the initial action and the order at issue. Seven of those are final and closed; one of those was modified to a Section 104(a) citation. One has recently been settled with the Section 104(d) designation remaining intact. The rest are still in contest. It does not appear that even if some of those 104(d) actions were resolved favorably to Cumberland that there was an "intervening clean inspection" at the Mine during the relevant time period.

11. There were seventeen miners working in the Cumberland West section of the Mine at the time that the order in this case was issued.

12. Cumberland stipulates to the authenticity of all exhibits that the Secretary identified in her Pre-Hearing Statement. Cumberland further stipulates that the Continuous Mining Section Reports, Continuous Section Call Out Sheets, and General Work Accomplished Reports that it produced in response to the Secretary's discovery requests are admissible.

13. The Secretary stipulates to the authenticity of all of the exhibits that Cumberland identified in its Pre-Hearing Statement.

14. The Report "Mine Citations, Orders, and Safeguards" is authentic and admissible. Cumberland does not stipulate to the relevancy of any violations that occurred prior to fifteen months before the issuance of the Order at issue. (*See* Joint Exhibit 1).

SUMMARY OF THE TESTIMONY

Inspector Walter R. Young

On October 6, 2008, Inspector Young conducted an inspection of Cumberland West and 89 Mains South sections. Inspector Young has been a Coal Mine Safety Health Inspector for MSHA for the past six years. (Tr. 24). Prior, he worked in coal mining for twenty-two years as a longwall foreman, shift foreman, and construction foreman. *Id*. As an MSHA Inspector, he attended the Mine Academy and took two courses, amongst others, on mine ventilation. (Tr. 25).

The Cumberland West section was a group of six entries, numbered 1 through 6 from left to right, that were driven forward in an east-to-west direction. (Tr.[1] 30-31). The six entries in the Cumberland West section were connected by many crosscuts that were driven in a north-south direction. The second mining area was a new section that Respondent was preparing to develop called 89 Mains South. (Tr. 78-79). The 89 Mains South section consisted of ten entries, numbered 1 through 10, left to right. (Tr. 30-32). The 89 Mains South section

[1] The abbreviation "Tr." refers to the Trial Transcript.

connected to the south side of the Cumberland West section at a ninety-degree angle and was planned to be developed in a north-to-south direction. (GX[2]-2; GX-4).

The Cumberland West section was ventilated by intake air (fresh air) coming into the mine by Entry No. 3, the track entry, and Entry No. 4, the neutral entry. (Tr. 32). According to Respondent's approved ventilation plan, most of the intake air should have traveled up to the face of the Cumberland West section. Some of the air was then supposed to split right across some of the West faces and travel out of the Mine along the right return air course which was the entry at the far-right end of the Cumberland West section. (Tr. 32-33). Another portion of the air should have split to the left across some of the West faces and all the 89 Mains South faces, then traveled out of the Mine along the left return air course, which was located in 89 Mains South. (Tr. 32). The left return was also designated as the alternate escapeway after the air had traversed the 89 Mains South faces. (Tr. 32). Some of the intake air was also diverted to the No. 2 Entry (the "belt entry") to ventilate the conveyor belt. (Tr. 33). On October 6, 2008, the ventilation system was still intended to ventilate the face of the Cumberland West section. (Tr. 134).

An addendum to the ventilation plan ("Vent Plan Addendum") for the construction and installation of a beltline was submitted to the Mine Safety and Health Administration ("MSHA") and approved on July 29, 2008. (Tr. 59-62). This plan was developed to address the construction of the belt drive/take-up system that was going to connect the future conveyor belt of the 89 Mains South section to the existing conveyor belt in the Cumberland West section. (Tr. 61, 85, 124). The plan provided that air from the West conveyor would ventilate the belt construction site and exit the area through a regulator (ventilation control device) into the left return (which was also the alternate escapeway). The Vent Plan Addendum included a map of the Cumberland West section, which also showed the beginning of the 89 Mains South section. (GX-4).

Initially, the faces of Cumberland West were mined to the west. By July 2008, Respondent had mined entries 2, 3, 4, 5, and 6 of the Cumberland West section to Crosscut No. 4, and had mined Cumberland West section Entry No. 1 to Crosscut No. 2. (Tr. 103). By October 2008, Respondent had mined entries 1, 2, 3, 4, and 6 to Crosscut No. 8, and Entry No. 5 to Crosscut No. 6; and by this time, mining of the faces of Cumberland West had stopped. (Tr. 63). One continuous miner was pulled back from the faces and was not in use; the other was being used to grade the bottom. (Tr. 75). Respondent began grading the bottom in the West area in preparation for a new portal where miners would enter and exit the mine. (Tr. 66). Cumberland was grading this area to ensure a sufficient and reasonable amount of clearance for the prospective portal area. (Tr. 66).

In addition to grading in the West area, Respondent was also preparing to go back to mining all the faces in 89 Mains South. (Tr. 124-26). Mining had been done at the faces in 89 Mains South also. (Tr. 153, 163). Respondent began moving equipment, including an auxiliary fan, to the 89 Mains South faces. (Tr. 63, 72, 125, 164-65). A continuous miner was moved to

[2] The abbreviation "GX" refers to Government Exhibit.

the 89 Mains South faces on October 8, 2008. (Tr. 164). Respondent was also installing a new belt conveyor in the No. 4 Entry of 89 Mains South. (Tr. 85). Respondent had mined coal bottoms in Entry No. 2 of the Cumberland West section on the shift prior October 6, 2008. (Tr. 39).

Between October 3-6, 2008, in anticipation of mining the faces in the 89 Mains South and for the purpose of installing the belt tailpiece, Respondent removed four metal stoppings. (Tr. 51). The first stopping was removed on Friday, October 3, two more stoppings were removed on Saturday, October 4, and the last stopping was removed on Monday, October 6, prior to the inspection at issue. (Tr. 52). Respondent's managers ordered the four permanent stoppings be removed so that the crew could bring a fan and other equipment over to the 89 Mains South section from the Cumberland West section. (Tr. 50-51). The metal stoppings were replaced with check curtains to facilitate access to the belt conveyor entry of 89 Mains South. (Tr. 51).

Inspector Young testified that while he was inspecting the faces of the 89 Mains South section on October 6, he discovered that three permanent ventilation controls were missing from Cumberland West section's left return air course. (Tr. 36). Where there was once a permanent stopping in the No. 1 Crosscut, there was an unsecured line curtain that was blown open by the intake air rushing into the return air course. (Tr. 36, 44). Inspector Young then noticed two more permanent stoppings were missing from the vicinity of the No. 89 Crosscut. Inspector Young performed a chemical smoke test at the locations of these three missing stoppings and confirmed that air was flowing from the intake into the return. (Tr. 47-48).

Inspector Young testified that he discussed the three missing stoppings with Safety Representative Perry and Foreman Andy Jellots. (Tr. 37). Inspector Young was told by Foreman Jellots that the removal of these permanent stoppings was ordered by continuous mining section coordinator Dan Fraley. (Tr. 51). Inspector Young told Safety Representative Perry and Foreman Jellots that the removal of these stoppings was not allowed and ordered them to remove the crew outby the tailpiece and to repair the missing stoppings. (Tr. 37-38). The miners were brought outby to repair the missing stoppings because the stoppings were essential for maintaining two escapeways from the working section, a primary and an alternate. (Tr. 38).

Inspector Young testified that he instructed Respondent to rebuild the two permanent stoppings at the No. 89 Crosscut (GX-2) and secure and tighten the curtains in Crosscut No. 1 (GX-2) and Crosscut No. 3 (GX-2) in order to terminate the violation. (Tr. 58-59, 127-128). It took nine to ten men over five hours to terminate the violation. (Tr. 58).

Inspector Young testified that he resumed his inspection and found that a fourth permanent ventilation control that had been installed to isolate the return air course was removed from the No. 3 Crosscut. (Tr. 44). This location also had a loose curtain. (Tr. 44).

Inspector Young testified that as part of his inspection he took air quantity readings for the left return air course and the left last-open crosscut. Inspector Young took his left return reading in the No. 86 Crosscut of Cumberland West, between the No. 2 and No. 3 block of the

89 Mains South section and found the air to be moving at 76,440 cubic feet per minute. (Tr. 42). Inspector Young took his left last-open crosscut reading in the No. 8 Crosscut between Entries Nos. 1 and 2 of the Cumberland West section and found the air quantity there to be 16,016 cubic feet per minute. (Tr. 43). Inspector Young noticed that his left last-open crosscut reading was significantly lower than the reading recorded by Respondent's most recent pre-shift examination. (CX[3]-H).

On cross examination, Inspector Young stated that the ventilation over the continuous miner and in the cited areas was more than sufficient. (Tr. 76-77, 179-180). Inspector Young testified that at the time he found the condition, the ventilation would have served to render any harmful or explosive gases harmless. (Tr. 78).

Inspector Young testified that after he finished his imminent danger run of the section, Respondent's Manager of Safety, Robert Bohach, requested to speak with him on the telephone located at the section's load center. (Tr. 55). Manager Bohach and other mine managers wanted to discuss the verbal order that Inspector Young had issued. (Tr. 55). After some discussion on the telephone, Manager Bohach requested Inspector Young to come above ground and discuss his order with mine management. (Tr. 57). Manager Bohach also requested that Inspector Young's supervisor participate in the conversation. (Tr. 55).

Inspector Young testified that he ordered two of the metal stoppings that had been replaced with temporary check curtains between October 4, 2008, and October 6, 2008, to be rebuilt in their original positions. (Tr. 87). He did not require the other two stoppings that had been removed to be rebuilt. (Tr. 57-58, 87). After Cumberland rebuilt two of the stoppings, Inspector Young left the mine but issued no written order. (Tr. 58-59).

Inspector Young testified that at Respondent's request he deferred the issuance of the written order until he was able to discuss the matter with his supervisor. (Tr. 57). Inspector Young's supervisor, Dave Severini, was not at the mine on that day and was unable to come there until the morning of October 7. (Tr. 57). On the morning of October 7, Inspector Young and Supervisor Severini discussed the prior day's order with members of the mine's management, including Manager Bohach, and concluded that the written order should be issued. (Tr. 57).

According to Inspector Young, the removed permanent stoppings violated multiple standards and presented multiple hazards to safety. Inspector Young stated to mine management that the two stoppings at the No. 89 Crosscut should have remained in place to keep the alternate escapeway (which was the same entry as the return air course) isolated so that it would not be contaminated with smoke in the event of a fire or explosion. (Tr. 68).

Inspector Young testified that throughout the course of the inspection, and his discussions with mine management about the order, that the removed permanent stoppings violated multiple standards and presented multiple hazards to safety. Inspector Young stated to

[3] The abbreviation "CX" refers to Cumberland Exhibit.

mine management that the two stoppings at the No. 89 Crosscut should have remained in place to keep the alternate escapeway (which was the same entry as the return air course) isolated so that it would not be contaminated with smoke in the event of a fire or explosion. (Tr. 68). Inspector Young also told Respondent that permanent stoppings needed to be installed along the return air course up to and including the third connecting crosscut outby the working face. (Tr. 69). Inspector Young identified the missing stoppings as the reason for the significant air loss at the left last-open crosscut and had Respondent repair the leaks from these locations in order to correct the "short circuit" that these leaks were causing in the ventilation of the left side of the Cumberland West section. (Tr. 44-45, 127-128). The notes made by Safety Representative Perry and Manager Bohach on October 7 confirm that Inspector Young discussed these concerns with them, as well as his concern that Respondent's pre-shift examiners were taking their air quantity measurements in the wrong locations on the left side of the Cumberland West section. (GX-9 and CX-H).

Inspector Young testified, and his notes show, that Coordinator Fraley, who ordered the removal of the stoppings, told Inspector Young that Respondent could remove the stoppings to prepare 89 Mains South for mining because the tailpiece had not moved and because the unit was a super section. (Tr. 95). Significantly, Inspector Young also testified and his notes show that he did not believe that Respondent intentionally subverted the law. (Tr. 99-100). Instead, Inspector Young believed that Respondent had simply "gotten ahead of themselves" in anticipation of mining the 89 Mains South area of the super section. (Tr. 99-100).

Inspector Young returned to the mine on October 7, 2008, with his supervisor and issued a written Section 104(d)(2) Order citing a violation of 30 C.F.R. § 75.380(a). The Order was designated as S&S, reasonably likely to cause a fatal injury, affecting seventeen persons, with high negligence and as a result of an unwarrantable failure to comply with a mandatory safety standard.

Safety Representative John W. Perry

Cumberland Safety Representative John Perry accompanied Inspector Young on his October 6, 2008 inspection of the Cumberland West and 89 Mains South sections (Tr. 35-36). As Safety Representative, Mr. Perry escorted inspectors when they came to the Mine, made independent safety examinations, controlled respirable dust, and conducted task training. (Tr. 116). He had worked in Cumberland's Safety Department for five years at the date of the inspection. *Id*. Representative Perry holds a four-year degree from the University of Pittsburgh in mining engineering and has over twenty years experience in mining. (Tr. 118-19).

During testimony, Representative Perry stated that the check curtains were intended to maintain the integrity of the ventilation in the Cumberland West and 89 Mains South sections. (Tr. 179-80). He also admitted that the corrections ordered by Inspector Young stopped the leakage of intake air into the return air course and "significantly improved" the amount of air reaching the face of the Cumberland West section. (Tr. 128).

Representative Perry testified that he had a discussion with Inspector Young on October 6 as to whether or not there was a violation of the escapeway standard. (Tr. 128). Representative Perry contended that the whole area was one super section. (Tr. 129). Such a super section would have the advantageous effect of moving the left last-open crosscut from the No. 8 Crosscut of the Cumberland West section all the way back to the east end of the 89 Mains South section. *Id.*

Representative Perry also testified that he had never had an inspector issue a citation under 75.333(h) when a stopping was completely removed and that this standard was typically cited for holes in stoppings. (Tr. 130). Representative Perry also testified that he believed that it was not reasonably likely that somebody would have been injured because of the curtains' condition. (Tr. 131). Representative Perry testified that it was not reasonably likely because there was very little methane in the section, with the highest reading being 0.2 at one of the faces. *Id.*

Manager of Safety Robert Bohach

Cumberland's Manager of Safety Robert Bohach also accompanied Inspector Young on the October 6, 2008 inspection of the Cumberland West and 89 Mains South sections. (Tr. 35-36). As Cumberland's Safety Manager since 1995, Manager Bohach oversees the health and safety of the miners, he ensures that Cumberland complies with regulations, develops emergency preparedness plans, and provides advice to mine management. (Tr. 172). Manager Bohach holds a Bachelor of Science Degree in Mining Engineering from Pennsylvania State University and a Master's Degree in Safety Management from West Virginia University; he has over twenty years experience in mining. (Tr. 171).

Manager Bohach testified that metal stoppings are accepted by MSHA as a permanent ventilation control and are used by Cumberland in lieu of curtains as a temporary stopping. (Tr. 175). Manager Bohach testified that he did not think the loose curtains would have created a situation reasonably likely to cause an injury because there was plenty of air coursed through the area. (Tr. 179-180). Similarly, it was not reasonably likely that an injury could have occurred because there was ample air going over the top of the continuous miner where the coal was being extracted and there was not any methane accumulation in any of the working places. (Tr. 180). The amount of air going over top of the miner was approximately 60,000 cubic feet per minute, about ten times more than what the ventilation plan required. (Tr. 181).

Manager Bohach also testified that over the course of his career he had never seen a citation issued under 75.333(h) for intentionally removing a stopping. (Tr. 183). The times that Manager Bohach had seen a citation issued under 75.333(h) was when there was a hole in a permanent stopping, a cable passing through a stopping, door sprung or left open, or a crushed metal stopping. (Tr. 189-190).

LAW AND REGULATIONS

Section 75.333(b)(1) requires "Permanent stoppings or other permanent ventilation control devices constructed after November 15, 1992 shall be built and maintained…[b]etween the intake and return air courses…"

Section 75.333(h) requires "All ventilation controls, including seals, shall be maintained to serve the purpose for which they were built."

ISSUES

1. Has the Secretary proved by a preponderance of the evidence that Respondent violated 30 C.F.R. § 75333(b)(1) and/or 30 C.F.R. § 75.333(h)?

2. If so, was the violation significant and substantial ("S&S") in nature?

3. Was Respondent's violative conduct so aggravated in nature as to constitute an unwarrantable failure?

DISCUSSION AND CONCLUSION

I. 30 C.F.R. § 75.333(b)(1)

The mandatory safety standard 30 C.F.R. § 75.333(b)(1) is one component of a comprehensive regulatory scheme, codified at Subpart D of 30 C.F.R. Part 75, that aims to ensure the proper ventilation of underground coal mines. Ventilation is necessary to "(1)…dilute, render harmless and carry away the hazardous components of mine air, such as potentially explosive methane; and (2) to provide necessary levels of oxygen to the miners' working environment." Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764-01, 9764 (Mar. 11, 1996). Because "[t]he primary means for directing air from the outside, through the mine openings, to the working areas and back to the surface is through the use of ventilation controls," the Secretary issued the specific directives codified at § 75.333 to specify "where each type of control can be used and how each permanent control is to be constructed." *Id.* at 9782. As such, § 75.333(b)(1) requires that permanent stoppings be installed to separate intake and return air courses up to and including the third connecting crosscut outby the working face, unless the operator's approved ventilation plan authorizes otherwise.

The active working area of the Cumberland West section on October 7, 2008, was in the No. 2 Entry between the No. 5 and No. 8 Crosscut. (GX-1). Respondent was required by § 7533(b)(1) to install permanent ventilation controls along the return air courses to separate the miners from the intake air up to and including the third connecting crosscut outby the face of the Cumberland West section. As this is the area where miners were working, this area required the delivery of "necessary levels of oxygen" and sufficient air to "dilute, render harmless and carry away the hazardous components of the mine air." 61 Fed. Reg. at 9764. Respondent had initially installed a line of permanent stoppings to isolate the left return air course, but chose to

remove four of those stoppings from Friday, October 3, to Monday, October 6, in order to allow men and equipment to travel to the 89 Mains South section.

Section 75.333(b)(1) contains an exception that allows temporary ventilation controls to be used in place of permanent ventilation controls in rooms that are six hundred feet or less from the centerline of the entry from which the room was developed. 30 C.F.R. § 75.33(b)(1). On the day of the inspection, Respondent's representatives argued to Inspector Young that they were not required to have the missing permanent ventilation controls installed because they were "rooming." (Tr. 55; GX-3). A room is a "place abutting an entry or air way where coal has been mined and extending from the entry or airway to a face." *Broken Hill Mining Co., Inc.,* 17 FMSHRC 1539, 1541 (Sept. 1995) (ALJ). Respondent was mining at the head of the No. 2 Entry of the Cumberland West section. By definition, a room cannot be at the head of an entry, so this exception does not apply to Respondent's ventilation of the face of the Cumberland West section. *Id.*

Further, Respondent argued at trial that permanent ventilation controls were not required because the Cumberland West section and the 89 Mains South section combined to form one "super-section," which then had the advantageous effect of moving the left last-open crosscut from the No. 8 Crosscut of the Cumberland West section back to the east end of the 89 Mains South section. (Tr. 128). Such a super-section arrangement is not illustrated, or supported, by Respondent's Vent Plan Addendum submitted on July 29, 2008. Also, Respondent was not attempting to maintain a super-section one week prior to the October 6 inspection, as Inspector Young was present at the Cumberland West section and had observed that the line of permanent stoppings along the left return air course "was solid to the 4 xcut." (GX-3 p. 13). This explanation must also be rejected so that compliance with the standard can not be easily circumvented by an operator's ability to simply redefine the boundaries of its sections.

The removal of these permanent stoppings resulted in a decrease in the quantity of air that was reaching the left side of the Cumberland West section's face. Thus, the standards have not been met and, therefore, the Secretary has established a violation of this safety standard.

II. 30 C.F.R. § 75.333(h)

All ventilation controls are required to be maintained for the purpose for which they were built. 30 C.F.R. § 75.333(h). Respondent admits that it is a violation of § 75.333(h) to have an open airlock door, to have a hole in a stopping, or for a stopping to be crushed or bent. (Tr. 189-190). The existence of any of these defects would be a failure to maintain a stopping in an adequate manner to control for leakage, and, therefore, would be a violation of the standard. Respondent argues that the standard only applies when a stopping has been damaged and does not apply when a stopping has been intentionally removed. (Tr. 130-31, 182-83).

Respondent's proposed readings of the standard would result in an outcome where a small hole drilled in a permanent stopping would be a failure to maintain that stopping for its intended purpose (which is to control air leakage), but removing a permanent stopping altogether, thereby allowing a much greater amount of air leakage, would not be a failure to

maintain that stopping for its intended purpose. This contradictory outcome vitiates the intention of the standard.

The permanent stoppings at issue were built for the purposes of preventing intake air from leaking into the return air course before it reached the face of the Cumberland West section. When Respondent removed these permanent stoppings and replaced them with unsecured curtains it failed to maintain the permanent stoppings for the purpose for which they were built. Thus, the standards have not been met and, therefore, the Secretary has established a violation of this safety standard.

III. Significant and Substantial

A violation is properly designated as significant and substantial ("S&S") if "based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.,* 3 FMSHRC 822, 825 (1981). The Commission has emphasized that an S&S finding is made in addition to the finding of the violation, noting that "something more than the violation of a standard itself is required." *Id.,* 3 FMSHRC at 826. To meet this definition, the Secretary must show: 1) an underlying violation of a mandatory safety standard; 2) a discrete safety hazard contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.,* 6 FMSHRC 1, 3-4 (1984).

As noted above, the first element of the *Mathies* test has been proven. Respondent intentionally removed four permanent stoppings that were required by § 75.333(b)(1) to be in place to isolate the intake air from the left return air course. The stoppings were also required by § 75.333(h) to be maintained to serve the purpose for which § 75.333(b)(1) required them to be built.

The second element of the *Mathies* formula requires that the Secretary prove a discrete safety hazard, that is, a measure of danger to safety, contributed to by the violation. In enacting the ventilation requirements of the Mine Act, Congress mandated that "the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away flammable, explosive, noxious, and harmful gases, and dust and smoke and explosive fumes" from all active workings. 30 U.S.C. § 863(b). The Commission has stated that "the hazards associated with inadequate ventilation, especially at working faces, are among the most serious in mining." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). In support of this statement, the Commission has referred to Congress' finding that "[v]entilation of a mine is important not only to provide fresh air to miners, and to control dust accumulation, but also to sweep away liberated methane before it can reach the range where the gas could become explosive" and thus "the requirements that a mine be adequately ventilated becomes one of the more important standards under the …Act." *Monterey Coal Co.,* 7 FMSHRC 996, 1000-01 (July 1985) (quoting S. Rep. NO. 95-181, at 41 (1977)). Here, Respondent's removal of the permanent ventilation controls resulted in a significant leakage of intake air into the left return air course before the intake air could reach the face of the Cumberland West section. The significant leakage of air resulted in a

substantial decrease in the amount of intake air that was reaching the left last-open crosscut, which was the face of the Cumberland West section. A substantial decrease in the amount of intake air reaching the face decreased the amount of fresh air reaching the miners which could lead to unconsciousness or asphyxiation. Such a decrease also allows methane and coal dust to accumulate, which creates the risk of a catastrophic ignition and explosion. Thus, there were clearly discrete safety hazards and measures of danger to safety contributed to by the violation of 30 C.F.R. § 75.333.

For the third element of the *Mathies* test, the Secretary must establish that, in the course of continued normal mining operations, there is a reasonable likelihood that the hazard contributed to will result in an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 34, 36 (Jan. 1984); *Consolidation Coal Co.,* 6 FMSHRC 34, 36 (Jan. 1984). A coal mine's ventilation plan must be "suitable to the conditions" of the mine. *U.S. Steel Mining Co.,* 7 FMSHRC at 1129 n. 5. Therefore, the ventilation plan of a gassy mine may require a greater amount of air quantity to be coursed through the mine than the minimum amount required by law. *Id.* The Commission has held that a violation that creates a significant decrease in the quantity of air reaching a working face is significant and substantial, even when low levels of methane and coal dust are present at the time the violation is found, because a buildup of methane could occur in a relatively short period of time in a gassy mine during normal mining operations. *Id; see also Broken Hill Mining Co.,* 17 FMSHRC at 1543-44 (ALJ Sep. 1995) (finding a violation of § 75.333(b)(1) to be S&S where no methane was detected): *Beech Fork Processing, Inc.,* 16 FMSHRC 1346, 1353 (ALJ June 1994) (finding a violation of 75.333(b)(1) to be S&S without any findings with regard to the level of methane, dust, or oxygen present).

At the time of the violation the Mine liberated in excess of seven million cubic feet of methane in a twenty-four hour period. (Tr. 65). The Mine has had face ignitions in the past (Tr. 5-6), and at the time of the violation a continuous miner was extracting coal at the face of the Cumberland West section. The crew at the Cumberland West section was engaged in a form of mining called "taking bottoms" at the time of the violation, which created the possibility that the drill bits of the continuous mining machine will strike rock and produce sparks. (Tr. 67). Respondent's own safety representative, John Perry, admitted that there was a "distinct loss of air" in the left return (Tr. 122), and that there was "a lot of leakage" in at least one of the curtains that was installed to replace the permanent stoppings. (Tr. 128). Inspector Young measured the air quantity in the left last-open crosscut to be 16,016 cubic feet per-minute, and the air quantity in the left last return to be 76,440 cubic feet per-minute. Therefore, 79% of the intake air being coursed up through the left side of the Cumberland West section was leaking to the return before it reached the face of the section. The amount of air that was reaching the left last-open crosscut was less than the 18,000 cubic feet per minute that was required by Respondent's approved ventilation plan. (Tr. 44). The significant reduction in air reaching the left side of the Cumberland West section, while mining was being conducted in the section, was reasonably likely to result in a serious injury or illness from loss of oxygen and/or the accumulation of noxious and explosive gas and dust if normal mining operations continued.

In addition, the likelihood of an injury or illness from this violation was increased by Respondent's failure to test the air quantity in the left last-open crosscut of the Cumberland West

section. The Mine began removing permanent stoppings from the left return on Friday, October 3. (GX-1). All three pre-shift examinations conducted on October 3, and the one pre-shift examination conducted on Saturday, October 4, took a left last-open crosscut air quantity reading in locations in the 89 Mains South section that were in close proximity to the location of their left return readings. (Tr. 146-147). Because Respondent's pre-shift examiners took the left last-open crosscut reading and the left return reading in such close proximity, no air leakage was detected. The pre-shift examiners did not test the quantity of air on the left side of the face of the Cumberland West section. For the remainder of Saturday, October 4, and Sunday, October 5, the section was idle and only left return readings were taken. On Saturday, October 5, and Monday, October 6, Respondent removed additional permanent stoppings from along the left return entry. (GX-1). When mining resumed on Monday, October 6, Respondent's pre-shift examiner again took his left last-open crosscut air-quantity reading near the location where he took his left return reading. (Tr. 148). It was not until the shift after Inspector Young's inspection that Respondent's pre-shift examiners began taking left last-open crosscut readings at the face of the Cumberland West section. (Tr. 149).

The Commission has held that it was an error for an ALJ to tie the S&S determination to solely "an analysis of the reasonable likelihood of injury resulting from low oxygen or methane ignition" for a violation of the borehole drilling standard, as the standard promotes the timely ascertainment of hazards. *Kelly's Creek Resources, Inc.,* 19 FMSHRC 457, 460-61 (Mar. 1997). However, the Commission held that ALJ erred in finding a violation non-S&S where miners entered a section of the mine that did not receive a pre-shift report inspection because the previous inspection occurred two days prior and methane may have built-up in that time. *Buck Creek Coal, Inc.,* 17 FMSHRC 8, 14 (Jan. 1995).

Air quantity readings by the pre-shift examiners are intended to protect miners from exposure to hazards of which they would otherwise be unaware. Because it failed to take readings of the air quantity on the left side of the Cumberland West face, Respondent, and its miners, were completely unaware of the significant loss of air from the leaks along the left return air course. Respondent's failure to take the preventative step of testing air quantity in the left side of the section's face, increased the likelihood that, under continued normal mining operations, miners would be unknowingly exposed to either low oxygen, noxious gases, respirable dust, or the hazard of an explosion from an accumulation of methane and coal dust. Accordingly, I find that the Secretary has established the third *Mathies* element.

The fourth *Mathies* element requires that the Secretary establish a reasonable likelihood that the injury in question would be of a reasonably serious nature. The particular standards violated were implemented to prevent highly serious dangers to miners, such as a loss of oxygen, the inhalation of respirable dust and explosions caused by the accumulation of methane and/or coal dust. The occurrence of any one of these scenarios would be gravely dangerous to miners and would likely result in fatal injuries. *Mathies*' fourth prong is clearly met. For all of these reasons, the gravity of Respondent's violation was properly classified as significant and substantial, and shall be sustained.

IV. Unwarrantable Failure

According to the regulatory guidelines, an operator's negligence is high if it "knew or should have known of the violative condition or practice and there are no mitigating circumstances." 30 C.F.R. § 100.3(d). Mitigating circumstances may include, but are not limited to, actions which an operator has taken to prevent, correct, or limit exposure to mine hazards. *Id.* However, where the actions taken to prevent, correct, or limit exposure to hazards are grossly inadequate, such actions should not be considered as mitigating circumstances. *Maple Creek,* 26 FMSHRC 539, 553 (June 2004) (ALJ), *aff'd in part & rev'd in part on other grounds,* 27 FMSHRC 555 (Aug. 2005).

Within the meaning of § 104(d) of the Act, an "unwarrantable failure" involves "aggravated conduct constituting more than ordinary negligence." *Buck Creek Coal, Inc. v. FMSHRC,* 52 F.3d 133, 136 (7th Cir. 1995) (quoting *Emery Mining Corp.,* 9 FMSHRC 1997 (Dec. 1997). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery,* 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.,* 13 FMSHRC 189, 194 (Feb. 1991). In *Emery*, the Commission distinguished between "negligence," which it defined as "inadvertent," "thoughtless," or "inattentive;" and conduct constituting an unwarrantable failure, which is "not justifiable" nor "excusable." 9 FMSHRC at 2001. Demonstrating aggravated conduct that constitutes an unwarrantable failure requires a showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of "indifference, willful intent, or serious lack of reasonable care." *Emry,* 9 FMSHRC at 2003 (*citing U.S. Steel Corp.,* 6 FMSHRC 1423, 1437 (June 1984)); *Westmoreland Mining Co.,* 7 FMSHRC 1342 (Sept. 1985)). The Secretary bears the burden of proving that the violation resulted from an unwarrantable failure. *Midwest Minerals, Inc.,* 21 FMSHRC 301, 306 (March 1999) (ALJ).

The Commission has recognized various factors as relevant to the unwarrantable failure determination, including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts to abate the condition, and the operator's knowledge of the existence of the violation. *Consolidation Coal Co.,* 22 FMSHRC 340, 353 (March 2000); *Windsor Coal Co.,* 21 FMSHRC 997, 1000 (Sept. 1999); *Mullins & Sons Coal Co.,* 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.,* 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals Inc.,* 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.,* 6 FMSHRC 1596, 1603 (July 1984). Each of the factors must be viewed in the context of the factual circumstances of a particular case, and some may be irrelevant to the specific situation. *IO Coal Co.,* 31 FMSHRC 1346 (Dec. 2009). It has been established that "all of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated." *Consolidation Coal Co.,* 22 FMSHRC at 353; *accord Windsor,* 21 FMSHRC at 1001 (noting that extensiveness alone is insufficient to sustain a finding of unwarrantable failure.) It is necessary for a judge to consider all relevant factors, rather than relying on one to the exclusion of others. *IO Coal,* 31 FMSHRC at 1351.

A violation may only be deemed the result of an unwarrantable failure if all relevant facts and circumstances of the case demonstrate that the operator's conduct was aggravated. *See Consolidation Coal Co.,* 22 FMSHRC at 353. Here, considering all of the facts and circumstances surrounding this order, the Secretary has failed to establish that aggravated conduct was present.

A. Extent and Duration of the Cited Condition

The Commission has viewed the extent of the violative condition as an element in the unwarrantable failure analysis. *IO Coal Co.,* 31 FMSHRC at 1351. The Commission has also emphasized that duration of a violative condition is a necessary element of the unwarrantable failure analysis. *Id.* at 352. Moreover, determination of the extensiveness of a condition must be made assuming continued normal mining operations, and must consider both the timeframe the condition existed prior to the issuance of the citation and the time it would have existed if normal mining operations had continued. *See U.S. Steel Mining,* 7 FMSHRC at 1130; *Maple Creek Mining,* 22 FMSHRC 742, 754 (ALJ Feldman June 2000).

The cited condition had only existed for a few days at the most. (GX-9). There were only two of the four locations that concerned the inspector so the extent was likewise limited. The ventilation over the continuous miner and in the cited areas was more than sufficient. Inspector Young testified that at the time he found the condition, the ventilation would have served to render any harmful or explosive gases harmless. Thus, the extent and duration of the cited condition was not unwarrantable.

B. There is No Evidence That Greater Efforts Were Required with Respect to Ventilation

The Secretary argues that Respondent was on notice that greater enforcement efforts were necessary. Respondent had no reason to believe that greater efforts were required with respect to the ventilation of the cited area. To show that past violations put an operator on "notice" for purposes of establishing an unwarrantable failure, the Secretary must also establish the similarity of the prior violations to the condition at issue. *See Cantera Green,* 21 FMSHRC 310, 312 (ALJ Melick March 1999); *see also Mountain Coal Co. LLC,* 26 FMSHRC 853, 869-70 (ALJ Manning Nov. 2004). To do so, the Secretary must establish the nature of the prior violations to show that they would be relevant to place the operator on notice regarding the violation at issue. *See Cantera Green,* 21 FMSHRC at 312.

The Secretary's reliance on past violations of 75.333(h) or 75.333(b)(1) is not appropriate. Inspector Young relied upon one previous violation of Section 75.380. This is a moot point as Section 75.380 is no longer at issue. Inspector Young did not rely on any violations of Section 75.333(b)(1) or 75.333(h) in designating the cited condition as an unwarrantable failure during the inspection. The Secretary introduced past violations of Section 75.333 as evidence to provide a basis for an unwarrantable failure that the inspector did not. All of the previous Section 75.333(h) violations were Section 104(a), Non-S&S, citations issued for actual maintenance issues with respect to stoppings, but not for removal of stoppings. (Tr. 70-

71; GX-7). Additionally, there was only one citation relative to Section 75.333(b)(1), the other standard that the Secretary relies upon. (Tr. 71; GX-6). This hardly represents a significant history.

Further, the purpose of evaluating the number of past violations is to determine the degree to which those violations have "engendered in the operator a heightened awareness of a *serious* problem." *IO Coal,* 31 FMSHRC at 1353, *citing San Juan,* 29 FMSHRC at 131. Respondent had no such problem because the existence of a limited number of non-S&S citations does not support the concept that a problem is occurring.

C. Respondent's Good-Faith Belief That the Condition was not a Hazard was Objectively Reasonable

An operator's knowledge of the existence of a violation and whether the violation is obvious are important elements of an unwarrantable failure analysis. *IO Coal,* 31 FMSHRC at 1356. If an operator acted on a good-faith belief that its cited condition was actually in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator's conduct will not be considered to be the result of an unwarrantable failure, even when it is determined later that the operator's belief was in error. *IO Coal,* 31 FMSHRC at 1356, (*citing Kellys Creek Resources, Inc.,* 19 FMSHRC 457, 463 (Mar. 1997)).

Inspector Young testified and his notes show that Coordinator Fraley, who ordered the removal of the stoppings, told Inspector Young that he believed Respondent could remove the stoppings to prepare 89 Mains South for mining because the tailpiece had not moved and because the unit was a super section. (Tr. 95). Inspector Young also testified and his notes show that he did not believe that Respondent intentionally subverted the law. (Tr. 99-100). Instead, Inspector Young believed that Respondent had simply "gotten ahead of themselves" in anticipation of mining the 89 Mains South area of the super section. (Tr. 99-100).

Finally, the Secretary's amendment of Inspector Young's Order regarding what standard the condition violated serves to illustrate that reasonable disagreements pertaining to mining standards and conditions exist. Respondent had a good-faith belief that there was no violation of the cited standards and evidence shows that this belief was objectively reasonable under the circumstances. Therefore, a violation cannot be considered the result of an unwarrantable failure.

D. Respondent Took Reasonable Steps to Abate the Purported Violation

An operator's effort in abating the violative condition is one of the factors established by the Commission as determinative of whether a violation is unwarrantable. *IO Coal,* 31 FMSHRC at 1356. Where an operator has been placed on notice of a problem, the level of priority that the operator places on the abatement of the problem is relevant. *Id.* The focus on the operator's abatement efforts is on those efforts made prior to the citation or order. *Id.*

Respondent had not been put on notice that a problem existed, but Respondent had taken significant efforts to maintain the integrity of the ventilation in both the Cumberland West and 89 Mains South sections. The metal stoppings were all replaced with temporary check curtains, which isolated the respective areas and kept the airflow velocity and direction substantially the same. (Tr. 73-77, 97, 121, 131, 179-80). The curtains allowed the air to ventilate into the return, as it had previously. (Tr. 85-89, 111-12). The continuous miner grading the coal bottoms had nine to ten times the airflow required. (Tr. 76-78, 181). The fact that the airflow maintained continuity throughout the removal of the stoppings in this area shows that Respondent took care and consideration in the changes made to the ventilation.

While Respondent did fail to take the preventative step of testing air quantity in the left side of the section's face, Respondent was conducting examinations regularly and monitoring the ventilation at other points to ensure the integrity of the system. (Tr. 73). The October 3 and 4 pre-shift examinations took the left last-open crosscut air quantity reading in locations in the 89 Mains South section that were in close proximity to the locations of their left return readings. It was not until Inspector Young's inspection that Respondent began taking left last-open crosscut readings at the face of the Cumberland West section. This creates a situation where Respondent could have been unaware that the air quantity in the left last-open cross-cut was 16,000 cubic feet per-minute while the approved ventilation plan required 18,000. Therefore, Respondent's placement of metal stoppings and check curtains were reasonable attempts to maintain a safe working environment.

E. The Cited Condition did not Present a High Degree of Danger

The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *IO Coal,* 31 FMSHRC at 1356; *see also Beth Energy Mines Inc.,* 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering the area); *Warren Steen Constr., Inc.,* 14 FMSHRC 1125, 1129 (July 1992) (finding violation to be aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and…that precautions are required when working near power lines with heavy equipment").

There was little to no methane found at the time the Order was issued. (Tr. 129-30; GX-1). While there was the possibility that the continous miner could strike rock and produce sparks, the Secretary presented no evidence of actual ignitions. For these reasons, and based upon the totality of the circumstances, the condition did not present a degree of danger high enough to necessitate a finding of unwarrantable failure.

F. All Relevant Facts and Circumstances

A violation may only be deemed the result of an unwarrantable failure if all relevant facts and circumstances of the case demonstrate that the operator's conduct was aggravated. *See Consolidation Coal Co.,* 22 FMSHRC at 353. Here, considering all of the facts and circumstances surrounding this Order, the Secretary has failed to establish that aggravated conduct was present.

The Commission outlined its authority assessing civil penalties in *Douglas R. Rushford Trucking,* stating that "the principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established." 22 FMSHRC 598, 600 (May 2000). While the Secretary's system for points in part 100 of 30 C.F.R. provides a recommended penalty, the ultimate assessment of the penalty is solely within the purview of the Commission. *Id.* Thus, a Commission judge is not bound by the penalty recommended by the Secretary. *Spartan Mining Co.,* 30 FMSHRC 699, 723 (Aug. 2008). The *de novo* assessment of civil penalties does not require each of the penalty assessment criteria to be given equal weight. *Thunder Basin Coal Co.,* 19 FMSHRC 1495, 1503 (Sept. 1997).

ORDER

After reviewing all the relevant facts and weighing the § 110(c) factors applicable to such and considering the above findings as to gravity and level of negligence associated with the citation and order, the Undersigned concludes that a penalty of $12,500 for the one violation is warranted.[4]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

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/smg

[4] Payment should be sent to: Payment Office, Mine Safety and Health Administration, U.S. Department of Labor, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N W., SUITE 9500
WASHINGTON, D.C. 20001
TELEPHONE: 202-434-9987 / FAX: 202-434-9949
December 20, 2011

JAYSON TURNER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2006-568-DM
	:	Case No. WE MD 2006-14
v.	:	
	:	
NATIONAL CEMENT COMPANY	:	Mine: Lebec Cement Plant
OF CALIFORNIA,	:	Mine ID: 04-00213
Respondent	:	

DECISION ON REMAND

Before: Judge Bulluck

This discrimination proceeding brought pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 C.F.R. § 815(c), has been remanded by the Commission for further consideration of *pro se* Complainant Jayson Turner's arguments and the record evidence on pretext. 33 FMSHRC 1059 (May 2011).

I. Factual and Procedural Summary

Jayson Turner, an electrician at National Cement's LeBec Cement Plant, in Kern County, California, worked at that facility for ten years and three months. 31 FMSHRC 1179, 1180 (Sept. 2009) (ALJ). During the period relevant to this proceeding, he worked the swing shift, from 2:00 p.m. to 12:30 a.m., Sunday through Wednesday. *Id.* At the same time that he was employed at National Cement, Turner was also employed on a part-time basis for Innovative Construction Solutions ("ICS"), a contractor that provided water treatment services to National Cement on the premises of its LeBec Plant. *Id.* Turner's second job at ICS had flexible hours and no set schedule. *Id.* On June 14, 2006, Turner, on pre-approved leave for his entire shift at National Cement to attend a doctor's appointment, showed his daughter around the ICS plant, and engaged in some work and "logged-in some activities," from approximately 10:30 a.m. to 1:30 p.m; later that afternoon, he had lunch with his daughter and kept his doctor's appointment at 4:00. *Id.* This incident, which ultimately resulted in Turner's termination, was the second of two run-ins between Turner and National Cement over his outside job at ICS. *Id.* The first incident, occurring on September 24, 2003, involved Turner working at ICS on a day and time that he was scheduled to work, but did not report to his job at National Cement for "personal reasons." *Id.* It resulted in a "written verbal" reprimand charging him with being "absent from work without consent of the Company," and warning him that if such an incident were to happen again, it would result "in more severe disciplinary action, including possible discharge." *Id.* On

June 14, 2006, just short of three years later, as a result of Turner's co-workers reporting to his immediate supervisor, chief electrician Julius Wetzel, that Turner had been sighted at ICS that morning, and based on ICS' report to Wetzel that Turner had performed some work while at the plant, National Cement's plant manager, Byron McMichael, ultimately terminated Turner, effective June 23, 2006. *Id.* at 1181. Turner was charged with "working for another firm on a day that [he was] absent from NCC and [his] less than acceptable performance." *Id.*

On July 16, 2006, Turner filed a Discrimination Complaint with the Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 105(c)(2). *Id.* at 1179. After completion of its investigation, by letter dated August 25, MSHA notified Turner of its conclusion that no violation of section 105(c) of the Act had occurred. *Id.* Thereafter, Turner filed an action with the Commission on August 31, 2006, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). *Id.* A hearing was held in Pasadena, California, and I issued a Decision concluding that, although Turner had engaged in activity protected by the Act, he failed to establish a *prima facie* case, because he did not prove that his protected activity in any part served as the basis for his termination by National Cement. *Id.* at 1180. Furthermore, I found that, assuming, *arguendo,* that Turner's protected activity played some part in the decision to fire him, National Cement ultimately proved that Turner was discharged for business reasons that were wholly unrelated to his protected activity. *Id.* I concluded that Turner was terminated for non-conformance with the company's policy respecting outside employment and less than satisfactory performance. *Id.* at 1186. I further found that National Cement would have terminated Turner on the sole basis of his conduct respecting his outside work at ICS, irrespective of any protected activity and, consequently, I dismissed his Discrimination Complaint. *Id.* Thereafter, the Commission granted Turner's Petition for Discretionary Review and, in a 3-2 split decision, vacated my decision and remanded the matter for further consideration of Turner's arguments on pretext.

II. The Law

A restatement of the applicable law at this juncture provides an organized framework in which to discuss my analysis of National Cement's justification and Turner's pretextual arguments, and the resultant findings and conclusions. A complainant alleging discrimination under the Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the person engaged in protected activity and that the protected activity complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.* 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.,* 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall,* 663 F. 2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.,* 3 FMSHRC 803, 817-18 (Apr. 1981). In *Pasula*, the Commission held that a complainant must prove a *prima facie* case by a preponderance of the evidence. 2 FMSHRC at 2799. The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the *prima facie* case in this matter, it, nevertheless, may defend affirmatively by proving that it also

was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula,* 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC,* 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test); *Boich v. FMSHRC,* 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

In determining whether a mine operator's adverse action was motivated by protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.,* 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.,* 709 F.2d 86 (D.C. Cir. 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* at 2510 (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* at 2510-12; *see also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (Apr. 1991). The Commission has also held that an "operator's knowledge of the miner's protected activity is probably the most important aspect of a circumstantial case" and that "knowledge . . . be proved by circumstantial evidence and reasonable inferences." *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept. 1999) (citing *Chacon*). In *Bradley v. Belva Coal Co.,* the Commission enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action, including evidence of the miner's unsatisfactory work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. 4 FMSHRC 982, 993 (June 1982). Ultimately, the Commisssion's inquiry into the operator's business justification for its actions is summarized as folows:

> [T]he inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The Commission may not impose its own business judgment as to an operator's actions. Further, . . . the Commission may not substitute its own justification for disciplining the miner over that offered by the operator.

Pendley v. FMSHRC, 601 F.3d 417, 423-24 (6th Cir. 2010) (restating the *Pasula-Robinette* test).

While I found that Turner had engaged in protected activity by bringing safety concerns to the attention of his supervisors, and that the complaints occurred in close proximity to his firing, I found that he did not establish a *prima facie* case because he failed to produce any evidence that his protected activity played any part in National Cement's decision to terminate him. 31 FMSHRC at 1183. However, the Commission majority, reviewing my *prima facie* case analysis *de novo*, noted that the burden of proof in establishing a *prima facie* case is lower than the ultimate burden of persuasion in proving a section 105(c) violation, and concluded that

Turner had presented sufficient circumstantial evidence to compel a conclusion that retaliation *could* be inferred from the evidence and, therefore, that he established a *prima facie* case. 33 FMSHRC at 1065-67. In so finding, notwithstanding the fact that Turner was required to prove a *prima facie* case by a preponderance of the evidence, the majority concluded that I had incorrectly elevated the burden of proving a *prima facie* case and failed to consider circumstantial evidence of impermissible motivation. *Id.* at 6; *see Pasula,* 2 FMSHRC at 2799 (a complainant must prove the two-pronged elements of a *prima facie* case by a preponderance of the evidence). Furthermore, respecting National Cement's defense, it concluded that I had failed to address evidence that the operator's justification for Turner's discharge was pretextual. 33 FMSHRC at 1065.

III. Instructions on Remand

Having determined that Turner established a *prima facie* case, the majority found that the record contains considerable evidence supporting Turner's arguments on pretext. I am directed, on remand, to consider and address the circumstantial evidence of National Cement's motivation in firing Turner by determining whether its defenses are credible and would have motived it, as claimed, and make necessary findings on the ultimate issue of discrimination. *Id.* at 1072-73. Moreover, the majority cautioned that National Cement's defense should not be "examined superficially or be approved automatically once offered." *Id.* at 1073 (citation omitted). The majority cited Commission precedent holding that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Id*. (citations omitted). In further explanation of Turner's burden in proving pretext, the majority pointed to courts' interpretations of other federal anti-discrimination statutes, noting that "[a] plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reason had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate his discharge, or (3) that they were *insufficient* to motivate discharge.'" *Id.* (citations omitted) (emphasis in original). By structuring its analysis in this way, the majority found that "[t]he record demonstrates that, at trial, Turner presented a significant amount of circumstantial evidence that the operator's purported reasons and explanations for firing him were inconsistent or otherwise suspect." *Id.* In summary, the majority found that "[I] should have questioned whether Turner's work for a short time at a second job prior to a shift for which he properly requested medical leave was a sufficient basis for firing him." *Id.* at 17. While it appears, as the majority strongly pointed out, that National Cement's explanation is suspect in some respects, careful and thorough consideration of its reasons for Turner's discharge leads to a conclusion that the operator was motivated solely by factors other than Turner's protected activity.

IV. National Cement's Rebuttal of Turner's *Prima Facie* Case

National Cement's proffered reasons for firing Turner were that he worked for ICS, his secondary employer, on a day that he was scheduled to work for National Cement but did not do so, and that his work performance was poor. The record is clear that Byron McMichael made the ultimate decision to terminate Turner based on Wetzel's report of Turner's work at ICS on June 14, review of Turner's personnel file, and recommendations that Turner be fired from Wetzel

and his supervisor, electrical manager, Bill Russell. Given that it is not readily apparent how Turner's work at ICS, prior to the time that he would have reported to his scheduled shift at National Cement, could have interfered with his primary employment, and given that Turner had never been disciplined beyond "written verbal" warnings for any performance deficiencies, National Cement's explanation for terminating him requires close examination. A critical eye must be applied to the operator's view of Turner's protected activity, as well as its view of his secondary job, and why the company even made an issue of Turner's work for ICS in the first place, and then was so rigid in its discipline. For the reasons that are fully discussed below, I find that National Cement successfully rebutted Turner's *prima facie* case by proving that Turner's termination was in no part motivated by his protected activity.

A. Knowledge

The majority was critical of my having credited McMichael's testimony that he was unaware of Turner's safety complaints, and made his decision based solely on Turner's non-protected conduct. It found that I had failed to reconcile this finding with evidence that Wetzel and Russell knew of Turner's protected activity and were consulted by McMichael in making his ultimate decision. *Id.* at 9. The majority instructed that "if Wetzel's and Russell's recommendations to terminate Turner were at least partially a result of retaliatory animus and if those recommendations influenced McMichael's decision to terminate Turner, then Wetzel's and Russell's knowledge and retaliatory animus *may* be attributed to the decision maker." *Id.* at 10 (emphasis added). Finally, the majority requires that "[a]s to the ultimate question of discriminatory motive, on remand, [I] must address whether McMichael's decision to terminate Turner was influenced by the recommendation of Wetzel and Russell. If so, Wetzel's and Russell's knowledge of Turner's protected activities *should* be imputed to McMichael." *Id.* at 11 (emphasis added).

Turner's protected activity, when considered in the context of National Cement's motivation, requires a separate analysis of management's reaction to each incident. Without evidence that Wetzel's and Russell's perception of Turner's safety complaints rose to a level of importance that would make it reasonable to infer that they were reported up the management chain to McMichael, the mere fact that the protected events occurred does not, in and of itself, lead to a conclusion that it is appropriate to impute their awareness of them to McMichael. A review of the record suggests otherwise, that the incidents were not viewed by Wetzel and Russell as serious, but rather, routine matters, typical of daily plant operation. As will be discussed in detail, the record does not provide a basis for imputing Wetzel's and Russell's knowledge of Turner's protected activity to McMichael, and establishes that McMichael only had actual knowledge of the roller mill shutdown, an incident that he did not consider a safety complaint.

1. Manlift Lights

Turner testified that, in January of 2006, he had mentioned to Wetzel and Russell that the company manlift needed after-market driving lights installed in front of the wheels, so as to

avoid potholes in the road when his assignments required driving the equipment at night in the unlit quarry area of the plant. Tr. 48-50, 102-03. According to Turner, Russell had suggested that he plug a "little job light" into a receptacle in the basket. Tr. 50, 52, 189; see 439. Russell testified that he very well may have made this suggestion to Turner in order to fix the problem immediately, but that he was of the opinion that modification of the lights was unnecessary, because the manlift had come from the manufacturer equipped with all the safety devices that it was required to have. Tr. 229, 231-32. Wetzel testified that he had addressed the problem by instituting a procedure whereby the manlift was positioned at the quarry during daylight, so that it would already be in place for electrical work performed at night. Tr. 453, 459-60. Wetzel also opined that Turner's suggestion would not have worked, because the driver sits in the back of the vehicle about 15 to 20 feet:

> The design of the manlift when you put lights on it to shine on the road in front of it, you couldn't effectively see them from where you're driving from anyway. You couldn't see it. The boom would be blocking your view. Long range there. So if you're shining in front of the manlift, I don't see how you could do any good.

Tr. 458-59. Turner does not challenge or contradict Wetzel's or Russell's testimony on their respective handling of this issue, and the record supports a conclusion that each supervisor believed that he had adequately addressed Turner's concern. There is simply no indication that Wetzel or Russell viewed Turner's complaint as either unresolved or of a magnitude that required McMichael's attention. In fact, Wetzel credibly testified that he had not even discussed the matter with Russell. Tr. 469-70. Therefore, I fully credit Wetzel and Russell, that neither of them had discussed Turner's request for lights on the manlift with McMichael and, because they viewed Turner's concern as an issue that had been promptly and fully addressed, there is no support in the record for imputing their knowledge to McMichael.

2. Thin, Electrically-Rated Gloves

Turner testified that, in April of 2006, he had reported the need for the electricians to have thin, tactile, electrically-rated gloves to the safety manager Randy Logsdon, safety committeemen Bill Edminister and Chris Hess, and Julius Wetzel. Tr. 18-19, 39, 104, 223-24. According to Turner, he had checked the status of his request with Logsdon on June 16, following his meeting with Wetzel and McMichael about suspending him pending termination, and Logsdon explained that his research on the gloves had turned up none that met his specifications. Tr. 19, 34-35, 105-06. Logsdon essentially gave the same account of how Turner had raised the need for the gloves, and stated that he had looked at a number of safety equipment catalogs, but had not been able to find the product. Tr. 361-63, 372. Logsdon testified that he had processed Turner's comments "as a request to research the availability of a potential new type of personal protective equipment," or an "inquiry," rather than a safety complaint. Tr. 369-70. Moreover, he opined that the electricians at National Cement had the proper equipment with which to perform their duties, and that they were able to work safely without the gloves that Turner had requested. Tr. 368-69. Finally, Logsdon testified credibly to having no recollection

of discussing Turner's request with McMichael, and described the kinds of issues that, generally, he would have brought to McMichael's attention as "higher level safety issues that would require a major expense, a major modification to plant equipment, a change in procedure or process, or capital investment." Tr. 365-67. Logsdon's testimony in this regard is consistent with McMichael's, that matters such as gloves should be addressed by the safety manager and that he, McMichael, for the most part, is not approached about, nor would he pay attention to "mundane routine items like safety-toed shoes for the employees." Tr. 316-18; see 243, 301-02.

Bill Russell testified that he had not been asked to provide any kind of safety gloves, and that he did not recall any conversation with Randy Logsdon about them. Tr. 196-97.

Julius Wetzel testified that he remembered Turner mentioning lightweight, electrically-rated gloves to him. Tr. 438. He also stated that, normally, he does not communicate safety issues raised by his subordinates to McMichael. Tr. 434. In his opinion, the electricians at National Cement do not have a need for gloves of this nature. Tr. 467. Contrary to the majority's reading of the transcript, that Wetzel's testimony was, in part, sarcastic, I observed the demeanor of Wetzel and Turner on cross-examination and found Wetzel's comment, "but you're not a lineman," a direct expression of his opposition to Turner's suggestion that his (Turner's) duties were analogous to that of a lineman, and consistent with his opinion that the gloves Turner had asked for were unnecessary. *Id.* at 12; Tr. 438.

The majority concluded that I had not considered Bill Edminister's testimony that he had raised Turner's concern about thin, electrically-rated gloves at a safety committee meeting, and that the response had been "kind of a chuckle," without comment. *Id.* at 9; Tr. 148. The majority goes further in that regard, pointing out that McMichael was most likely in attendance at that safety meeting. *Id.* at 10. Without more, for example, the identity of the chuckler and conversation in which to put the gesture into context, it is difficult, if not impossible, to ascertain what to make of it. McMichael may have very well been at that meeting, although he testified to only vaguely remembering Logsdon announcing at one of the meetings that he was investigating gloves for electricians, but had no knowledge of who had prompted the request. Tr. 310. Whether this was the same meeting to which Edminister was referring is unclear from the record. As probable as it seems that McMichael was present at a safety committee meeting where Turner's concern about the gloves was expressed, it is as probable that no one elevated the concern beyond a routine request for equipment. After all, the union is represented in these meetings and there is no evidence that the union felt it necessary to intercede for Turner or get involved in the matter otherwise.

Turner was not forthcoming with any evidence that thin, electrically-rated gloves existed at the time of his request, despite his assertions at hearing that the gloves "became available in the last few years." Tr. 36-37, 226. Moreover, Turner failed to establish that the gloves he asked for were necessary. Indeed, Randy Logsdon researched the gloves, and the fact that he did not tell Turner that they were unavailable until Turner asked for an update in mid June supports his testimony that he viewed Turner's concerns as a mere request for equipment. There is no indication from the record that National Cement viewed Turner's concern about the gloves as an

issue requiring higher level attention from McMichael, or action beyond Logsdon's research. In fact, because Logsdon had researched them, it is reasonable to assume that had he found them, he would have provided them to Turner. In any case, I credit Russell's testimony that he was unaware of Turner's concerns about the gloves and, because the record supports a conclusion that these gloves were small-line items and unessential, I conclude that Wetzel did not make McMichael aware of Turner's complaint, and there is no support in the record for imputing Wetzel's knowledge to McMichael.

3. Roller Mill Troubleshooting

Jayson Turner and National Cement could not hold more divergent views of the roller mill incident of May 24, 2006, when Turner, required to rack-in the roller mill, improperly engaged the wrong switch gear to the old raw mill and shut down the power to the entire plant. Tr. 24-30, 205-06, 490-91, 497-500, 564. Turner has been credited with having made a safety complaint about this inactive raw mill being mislabeled and not locked and tagged-out of service by National Cement. Tr. 20-21, 26-28, 31. Rather than a safety complaint, National Cement views this incident as an example of Turner's poor performance.

Bill Edminister shed some light on the circumstances surrounding the incident by explaining that the old raw mill had not been dismantled so that, at some point in the future, National Cement could make use of the system. Tr. 176. He also testified that power interruptions to the plant occur frequently, which was corroborated by Wetzel's estimate that four or five employees, over a six year period, had knocked down power to the plant. Tr. 143-44, 507. Bill Russell testified that other employees responsible for interrupting power were "written up" just like Turner. Tr. 196; see 507-08 (Wetzel's corroboration of this point).

Russell and Wetzel gave similar accounts of the incident. Russell testified that, instead of racking-in the roller mill, Turner went to the main substation where the old raw mill starter was located and racked that in, which is what knocked out the power to the plant. Tr. 205-06. According to Russell, this should not have happened because, "the old raw mill had been out of service for at least five years when this happened. . . . Everybody knew it was out of commission for the last five years. He shouldn't have been over there. The starter where you go in to rack-in and out the physical roller mill is in an entirely different building." Tr. 206-07. Wetzel, likewise, testified that Turner never should have left the building: "[t]here was no reason for him- - if he troubleshot the system properly, he shouldn't have been over there." Tr. 495-98. In Wetzel's opinion, Turner's poor troubleshooting technique, i.e., that he was in the wrong place, was responsible for exposing him to the "misidentified" equipment. Tr. 496-98. Furthermore, the electrician's log reflects that Turner had successfully racked-in the roller mill on several occasions, an indication that he should have known how to properly troubleshoot the equipment on May 24. Tr. 519-23, 524-25; Ex. R-5.

According to Turner, through his own testimony and cross-examination of Russell and Wetzel, he was not attempting to rack-in the roller mill, but restore the medium voltage disconnect. Tr. 211-12, 563. Stated another way, he "was actually looking for the power supply

and not the starter, itself." Tr. 567. He further testified that, because of the written warning that Wetzel had issued to him on June 6 for "mistakenly knocking the plant power down by disconnecting the wrong medium voltage disconnect supplying power to the new raw mill," he "knew [his] job was on the chopping block," and he filed a grievance on June 12. Tr. 30-31.

Byron McMichael's testimony, "[y]eah, the whole plant would know that. Everyone knew that all the power was off," makes clear that he knew of Turner's accident. Tr. 273, 302. There is ample evidence, however, that National Cement viewed the incident as a performance deficiency, and Wetzel, Russell and McMichael testified that Turner would not have been terminated solely for his job performance. Tr. 198 (Russell); 262, 269 (McMichael); 462-63, 557-58 (Wetzel). The record supports this testimony - - Turner was disciplined in the same manner as others who committed the same infraction. It is abundantly clear that no further action, beyond the "written verbal" warning was contemplated for Turner having caused the power interruption. It was not until the second ICS incident that National Cement was motivated to act. Turner's job performance was not even discussed with Turner and union representative Neal Janousek at the June 16 meeting, which is further indication that Turner's performance was reviewed secondarily, more so as an aggravating factor, and would not have been called into question had the ICS incident not occurred. Tr. 544-546.

4. Pre-Calciner Burner Troubleshooting

Turner alleges that, on June 12, 2006, he complained to Allen Lee, the process control supervisor, that Lee had put the tower rangers and Turner in harm's way by needlessly subjecting them to extreme heat and toxic gasses in the Pre-Calciner burner tower, in order for them to determine why the burners could not be started remotely. Tr. 43-44. According to Turner, the problem was clearly identifiable, and could have been resolved easily from the control room by reducing the main gas pressure on the kiln deck burner. Tr. 44. Turner testified that he and his co-workers spent an hour troubleshooting the burners in the hot, gaseous environment for no good reason and, thereafter, he made a "pretty stern statement" to Lee over the radio, that they were angry and that Lee should record the solution in the log-book for future reference. Tr. 44-48.

Tom Hastings testified that he recalled troubleshooting the Pre-Calciner burners with Turner that night, and saying something to Turner "about [him] possibly angering somebody . . . over the radio." Tr. 349; see 352-53. He stated that he could not remember Turner's exact comment, but that he recalled the workers being "a little upset about it because it's not exactly a safe place to be." Tr. 350, 352. Hastings' testimony provides ample corroboration that Turner had expressed his anger to Lee, which has been credited to Turner as a bona fide safety complaint.

Allen Lee had no supervisory authority over the electrical shop, and the record is bereft of any indication that he spoke to anyone about Turner's conduct, or was in any way involved in the decision to terminate him. Tr. 99, 101. Turner, himself, testified that Lee did not take his suggestion and annotate the log, which makes it likely that nothing had been written about the

incident. Tr. 47. Furthermore, there is no evidence that establishes Logsdon's, Wetzel's, Russell's, or McMichael's knowledge of the Pre-Calciner burner incident or Turner's strident radio communication to Lee. Tr. 198, 238, 273, 410, 505-07. Therefore, the record does not support a basis for either imputing Wetzel's or Russell's knowledge to McMichael, or crediting McMichael with actual knowledge of Turner's complaint.

B. Animus

The majority suggests that National Cement was, by and large, unresponsive to Turner's complaints. My consideration of the record leads me to a contrary conclusion. I find that the operator's actions, respecting each instance of protected activity, were within the realm of reasonable behavior and, therefore, not indicative of any hostility. Based on this conclusion, there is no basis to support imputing to McMichael animus on the part of Wetzel and Russell for Turner's safety complaints, just as there is no evidence of animus on the part of McMichael respecting the sole incident of which he was aware, the power interruption to the plant.

1. Manlift Lights

Piggybacking on the previous discussion of Wetzel's and Russell's handling of Turner's request for after-market lights on the manlift, although Turner may not have been completely satisfied, the record indicates that both managers believed the issue to have been fully addressed and resolved in January of 2006, when it was raised. The record supports a conclusion that the issue died in January, that there was no hostility on the part of any management official about Turner's complaint when it occurred or at any time thereafter, and that it was never a motivating factor for any action taken by National Cement during the balance of Turner's employment.

2. Thin, Electrically-Rated Gloves

The complaint about the electricians not being outfitted with thin, electrically-rated gloves occurred in April of 2006. At this juncture, the question of Russell's mind set about this matter is a non-issue, inasmuch as Russell's testimony that he had no knowledge of the glove issue was not controverted by Turner and is wholly credible. The record establishes that Randy Logsdon made earnest, albeit unfruitful, efforts to locate gloves that satisfied the specifications requested by Turner. This is true, despite the fact that Logsdon believed the electricians to have already been provided with adequate equipment to perform their duties safely. The fact that Logsdon did not give Turner an update until Turner approached him in June may appear inattentive by some standards, but clearly this delay of two months or less does not outweigh Logsdon's attempts to satisfy Turner's request. On the other hand, Wetzel's reaction to Turner's request, while perhaps appearing to have been somewhat passive, is explained by his position, like Logsdon's, that National Cement's electricians had no need for the gloves. Finally, as has been fully explained above, the record considered in its entirety does not support taking the giant leap necessary to support a conclusion that the "chuckle" about the gloves in the safety committee meeting was indicative of hostility on the part of National Cement management.

3. Roller Mill Troubleshooting

Turner's accidental shutdown of the plant on May 24, caused by his improper engagement of the wrong switch gear, was clearly considered a performance deficiency by National Cement, for which he received minimal discipline. While the majority has pointed out that power interruptions to the plant were common occurrences, the record makes clear that National Cement treated Turner in the same fashion as others who had committed the same offense; they were issued "written verbals." Furthermore, the record provides no indication of any additional discipline, beyond the warning, either contemplated by the company or actually meted out to Turner. Turner's testimony that he "knew [his] job was on the chopping block," is simply not borne out by the record. Wetzel, Russell and McMichael all testified that Turner would not have been fired for the roller mill debacle and, in fact, he was not fired until the intervening trigger occurred, the ICS incident. Tr. 462-63, 557-58 (Wetzel); 196 (Russell); 262, 269 (McMichael). Finally, there is no support in the record for Turner's claim that his written report of the roller mill incident, in which he complained about the equipment being mislabeled and not locked and tagged-out of service, engendered hostility on the part of National Cement management.

4. Pre-Calciner Burner Troubleshooting

Turner's safety complaint about miners needlessly being exposed to the extreme heat and gaseous environment in the Pre-Calciner tower was expressed by radio to the process control supervisor Allen Lee. As has been stated, Lee did not supervise National Cement's electricians, and had no involvement in the decision to terminate Turner. There is no evidence of Lee's reaction to Turner's complaint, or of Lee communicating Turner's complaint to anyone. Therefore, the record establishes no basis for ascribing animus on the part of Wetzel, Russell or McMichael towards Turner's complaint.

5. Wetzel's Opinion of Turner

Wetzel's characterization of Turner as "difficult" has been called into question by the majority, which noted that Wetzel clearly disliked Turner. 33 FMSHRC at 1070 n.9. I fully credit Wetzel's testimony that Turner is hard to communicate with, defensive, does not listen, and takes personally things that were not so intended, as fully consistent with Turner's uncooperative conduct throughout all stages of this proceeding. Tr. 460-61, 488. The record is replete with instances of Turner's disruptive behavior and refusal to follow instructions, despite the latitude and assistance that he was afforded in presenting his case. Tr. 39, 342-43, 378, 382, 435-36, 437, 458, 462, 465-66, 513, 517, 525, 529-30; see also *Id*. at 1088 n.5. Consideration of Turner's consistent obstreperous pattern of behavior in this forum provides support for Wetzel's negative view of him, and any hostility on Wetzel's part is reasonably attributable to Turner's behavior. Therefore, there is no basis in the record for concluding that Wetzel's negative opinion of Turner was based on Turner's protected activity.

6. Turner's Performance

As Turner's immediate supervisor, Wetzel was of the opinion that Turner was not a good electrician. He was able to give examples of Turner's poor work habits, as well as his failure to follow instructions. Tr. 485-489. In fact, Wetzel testified that other electricians refused to work with him, and that his recommendation to McMichael, that Turner should be terminated, was based more so on performance than Turner's work at ICS. Tr. 488-89, 558-59, 571-72. Because Wetzel directly oversaw Turner's work, and his clear, detailed accounts of Turner's deficiencies were unrebutted, I also conclude that Wetzel's overall view of Turner as an electrician, as well as his performance, were not bases for attributing animus to Wetzel for Turner's protected activity.

C. Time Proximity

The four instances of Turner's protected activity occurred as follows: (1) the manlift lights complaint in January; (2) the request for thin, electrically-rated gloves in April; (3) racking-in the mislabeled raw mill that had not been locked and tagged-out of service, and interrupting power to the plant on May 24; and (4) troubleshooting the Pre-Calciner burners on June 12. The record provides no indication that these incidents, the latest having occurred within days of Turner's suspension and ultimate termination, individually or collectively, sparked any formal action from National Cement, adverse or otherwise, except the "written verbal" warning. The seminal event, breaking the link between Turner's protected activity and his termination, was Turner's outside employment at ICS - - an incident of such monumental magnitude to National Cement, that it prompted a swift reaction, and by some standards, an overreaction. See Tr. 512 (Wetzel's testimony that, in retrospect, warning Turner would have been more appropriate than firing him). Consequently, because I find overwhelming support in the record that the intervening event triggered Turner's firing, I do not find the timing of Turner's protected activity and his termination indicia of animus or retaliatory motive.

D. Disparate Treatment

National Cement presented testimony that another electrician, Joseph Kowalski, had been terminated for working a secondary job during a time that he would have been working for National Cement. Tr. 327-30. However, the record indicates that the basis of Kowalski's termination was a violation of National Cement's negotiated attendance policy, i.e., absence for three consecutive workdays without providing adequate notice to the operator and a satisfactory reason for the absence. Ex. ALJ-1. Turner's leave had been duly approved on the day that he worked at ICS, on the other hand, and his attendance was never called into question when his termination was contemplated. Consequently, because Kowalski was also fired, although for a different reason, considering the lack of evidence of any similarly situated employee, not terminated for working a secondary job under similar circumstances and, therefore, treated more favorably than Turner, it must be concluded that Turner was not treated disparately.

In analyzing the circumstantial evidence in this case, and concluding that Turner's protected activity played no part in his termination, I have also considered the evidence that

addresses the question of why Turner's work on June 14 evoked such strong reaction from the operator. In particular, I have examined National Cement's attitudes about ICS, Turner's outside employment at the water treatment facility, and the operator's general view of Turner as an employee. These factors, as well as others raised by the Commission majority, are discussed in conjunction with the alternative analysis, National Cement's affirmative defense of Turner's termination.

V. National Cement's Affirmative Defense, in the Alternative

Assuming, *arguendo*, that Turner's protected activity had played some part in National Cement's decision to terminate him, the operator has also proven that it was also motivated by Turner's work at ICS on June 14, and that it would have terminated him for that incident alone.

Turner's work at ICS in September 2003, at a time when he had been scheduled to work for National Cement, is the first incident of record suggestive of the operator's irritation with Turner's work for the water treatment facility. Turner was issued a "written verbal," warning him that repeated behavior would result in more severe discipline, possibly discharge. As was discussed earlier, that incident is distinguishable from Turner's work at ICS in June 2006, which occurred prior to Turner's scheduled shift. For that reason, and because there is no evidence that Turner had been warned specifically not to work at his outside job whenever he took leave from National Cement, it appears that Turner may not have considered his behavior on June 14 to constitute a repeat of the earlier infraction. Turner testified that he had gotten into a routine of working at ICS before or after his National Cement shift. Tr. 85. There is some indication, however, as discussed below, that Turner's conduct on June 14 was known to other employees to be prohibited by the operator and that, perhaps, Turner was not as naive as he contends. Moreover, there is some indication that Turner's conduct was known, at least according to McMicheal, to run afoul of the negotiated labor agreement. Tr. 340.

Byron McMichael was less than pleased about ICS' services to National Cement. He testified repeatedly that he viewed ICS as an economic liability to the company inherited from previous owners. Tr. 252-53. Furthermore, McMichael had very little tolerance for Turner's work arrangement with ICS. When asked by Turner why he felt it necessary to fire him, McMichael expressed his annoyance quite candidly:

> It was my opinion after having warned you about that prior to that, having worked for a contractor on our site, which is annoying to me to start with. We hire people to work for us, we want them to perform their work and you deprived us of your work that day. And to me, that was very irritating, and time for a change.

Tr. 252. McMichael's opinion, directed to Turner, "you could have scheduled your blood pressure test some other time and interrupted your work with ICS, your part-time job, and provided service for us that day," is further indication that, despite National Cement's authorization for Turner's outside work, McMichael viewed it with contempt. Tr. 334. At

Turner's suggestion to McMichael that firing him was unreasonable given that he, Turner, had offered to return to work on June 14, if needed, this was McMichael's response:

> I'll repeat again. We do not tolerate somebody working for a subcontractor at National Cement Services. I felt that you should have been coming in and doing some work for us. If you work for a subcontractor, it's my opinion you should be able to work for us.

Tr. 339; see Tr. 340-41 (McMichael's testimony that, on a day that a National Cement employee requests time off, he should not be working for anyone else); see also Tr. 333 (McMichael's testimony that, had Turner worked for National Cement on June 14, he would not have been fired for also working for ICS); Tr. 483 (Wetzel's testimony that if Turner had come to work that day, there would not have been a problem).

Finally, National Cement would not have been wise to Turner's whereabouts without the help of informants. That several of Turner's co-workers reported the Turner sighting at ICS to Wetzel suggests that Turner's outside job was widely known to be a bone of contention, for whatever reason. Otherwise, it makes no sense for anyone to have chosen that particular day, when Turner had taken off from National Cement, to report Turner's presence at ICS to his supervisor. It also suggests that Turner's co-workers were likely trying to put his job in jeopardy, knew exactly when the opportunity presented itself, and seized it. Moreover, their conduct also suggests that Turner may have been viewed negatively by other employees, and lends credence to Wetzel's hearsay testimony that other electricians had expressed dislike for working with Turner.

In concluding that National Cement has prevailed under this alternative analysis, by presenting overwhelming evidence that McMichael's irritation with ICS in general, and Turner's work arrangement with ICS in particular, was of such magnitude that it would have motivated him to terminate Turner for the ICS incident alone, I have carefully reconsidered Turner's pretextual arguments and reject them for lack of evidentiary support.

VI. Pretext

The majority directed that I consider, in determining whether Turner proved National Cement's reason for his termination to be pretextual, that Turner was compliant with National Cement's attendance policy pursuant to the negotiated labor agreement, that National Cement did not adhere to its attendance policy, and that Turner's performance issues were not significant.

In actuality, National Cement has never contended that Turner was not on pre-approved leave on June 14. Furthermore, Turner's attendance record was never called into question by National Cement and, therefore, it is not an issue that is properly before me in this case. Likewise, the question of whether National Cement acted in accordance with its "no fault attendance" policy is not before me, for the reason that Turner was terminated for conduct other

than attendance-based infractions to which the disciplinary provisions set in place by the labor agreement would apply. See Tr. 271-72 (McMichael's discussion of National Cement's "no fault attendance" program); Tr. 219 (Russell's testimony that the point system applies to attendance only).

As has been discussed, Turner's performance issues were Wetzel's primary motivation in recommending Turner's termination, but they played only a minor, secondary role in McMichael's decision making. Without the documented "written verbals" considered in Turner's personnel file and Wetzel's discussion with McMichael about other performance deficiencies, McMichael would have terminated Turner anyway just for working at ICS. See Tr. 485-87 (Wetzel's examples of Turner's performance problems).

Nothing in this decision is intended to suggest that National Cement's treatment of Turner was anything less than heavy-handed and, for the most part, lacking in compassion. The record suggests that, based on the fact that Turner was viewed as a difficult employee, he was not going to get a break. It didn't take much to push McMichael over the edge respecting his tolerance of Turner's work arrangement at ICS, given his level of annoyance and absent encouragement from Turner's supervisors to go easy on him. In fact, according to McMichael, if he had it to do over, he would fire Turner again. Tr. 334. Turner's only protection under the Act, however, is his right to be free of retaliation for his legitimate safety related complaints. He is not protected from National Cement's negative opinion of his personality, nor is he protected from National Cement's objection to or intolerance of his outside employment. This is true no matter how unreasonable the reaction, as long as the operator's motivation is unrelated to Turner's right to reasonably complain. Here, the weight of the evidence supports a conclusion that fairness and leniency were given no consideration in the resolve to construe Turner's June 14 activities as a fireable offense, but neither were the safety concerns that Turner had brought to the operator's attention in close proximity to the ICS incident. To conclude otherwise amounts to cherry-picking facts piecemeal, in order to construct a scenario that strays well beyond that which the record compels. Finally, I note that, as harsh as National Cement's actions might appear, an arbitrator upheld Turner's termination through the negotiated grievance process. Tr. 289, 344.

VII. Conclusion

Based on a thorough review of the record, I conclude that Turner has failed to establish, by a preponderance of the evidence, that he was terminated for engaging in activity protected under section 105(c) of the Act.

ORDER

Accordingly, it is **ORDERED** that Jayson Turner's Discrimination Complaint against National Cement Company of California, Incorporated, is **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

December 21, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2009-99
Petitioner,	:	A.C. No. 44-06045-169692
	:	
v.	:	
	:	
HUMPHREYS ENTERPRISES, INC.,	:	
Respondent.	:	Mine: No. 5 Strip

DECISION

Appearances: Francine A. Serafin, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner;

William J. Sturgill, Esq., Sturgill & Sturgill, Norton, Virginia, on behalf of the Respondent.

Before: Judge Paez

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. In dispute is a single section 104(d)(1) citation issued to Humphreys Enterprises, Inc. ("Humphreys"), by an inspector with the Mine Safety and Health Administration ("MSHA"), alleging a violation of 30 C.F.R. § 77.1005(a) at Humphreys's No. 5 Strip mine. Humphreys timely filed an answer and the case was assigned to me for hearing and decision.

I. Statement of the Case

Prior to the hearing, Humphreys filed a motion to compel production of MSHA's special assessment sheet, which I denied as privileged by order dated December 23, 2010. Originally, the case contained two violations issued to Humphreys – Citation No. 6639082 and Order No. 6639083. The parties settled Order No. 6639083, which I approved in my Decision Approving Partial Settlement issued on February 16, 2011. After issuing a rescheduling notice, a hearing on the merits of Citation No. 6639082 was held on February 24, 2011, in Big Stone Gap, Virginia. After its conclusion, the parties submitted written post-hearing briefs, as well as reply briefs.

Citation No. 6639082 alleges a violation of the mandatory safety standard at 30 C.F.R. § 77.1005(a). It was issued under section 104(d)(1) of the Mine Act and alleges that the citation

was not only a significant and substantial ("S&S")[1] violation but also the result of the operator's unwarrantable failure[2] to comply with a mandatory safety standard promulgated under the Mine Act. Respondent disputes these allegations. The Secretary proposes an assessed penalty of $70,000.00 based on the above allegations.

II. Issues

The issues before me are (1) whether a violation of section 77.1005(a) occurred; (2) whether the alleged violation is S&S; (3) whether the alleged violation was the result of the operator's unwarrantable failure; and (4) whether the proposed penalty is appropriate for any occurring violation.

For the reasons stated below, I determine that Humphreys violated section 77.1005(a) and that the violation was both S&S and due to a high level of negligence by Humphreys. However, I conclude that the violation was not the result of Humphreys's unwarrantable failure.

III. Findings of Fact

Humphreys runs the No. 2 facility in which its No. 5 section is a strip mining operation called the No. 5 Strip mine. At the No. 5 Strip mine, a driller machine is used to drill a hole in the ground down to where the coal seam is located. (Tr. 29.) In order to prepare the ground for drilling, the hill is "benched," or flattened out to prepare for drilling and blasting. (Tr. 150–52.) The mine operator creates a pattern of holes then fills the holes with explosive materials. (*Id*.) The explosive materials are then ignited, resulting in a blast. (*Id*.) After the blast, the coal is collected and hauled away.

The No. 5 Strip mine contains two seams of coal, the Morris seam and the Parsons seam. (Tr. 17.) These two seams were being mined on a hill. The Morris seam is located higher on the hill than the Parsons seam. (*Id*.) At the time this citation was issued, Humphreys had "stripped" the Morris seam. (*Id*.; Gov't Ex. 4). The Parsons seam was located roughly halfway up the hill. (Tr. 20; Gov't Ex. 4.) Humphreys had only partially stripped the Parsons seam. (Tr. 17.) The part of the hill where the Parsons seam was located had been flattened out to the point that machinery could drive on it safely. (Tr. 20.) However, an area above the Parsons seam between

[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[2] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

the stripped Morris seam and the Parsons seam was covered with spoil[3] and dead trees. (Tr. 18.) Below the Parsons seam, farther down the hill, was a highwall. (Tr. 19.) The highwall created a ledge with a fifty-foot drop from the ledge of the highwall to solid ground at the bottom. (Tr. 48.)

On August 26, 2008, MSHA Inspector Wade Gardner was conducting a routine inspection of the No. 5 Strip mine. (Tr. 17; Gov't Ex. 1.) As an inspector, Gardner is a specialist in health and safety with MSHA, and he conducts regular safety inspections. (Tr. 15.) Gardner has a total of forty-six years in the mining industry, and has spent the last thirty-six years working for MSHA. (*Id*.) In that time, he has conducted over one hundred accident investigations. (Tr. 16.)

The August 27 citation at issue in this case is based on an earlier citation Gardner issued during his August 26 inspection. Gardner issued Citation No. 6639078 on August 26 due to loose spoil material and trees located above the Parsons level.[4] (Tr. 23; Gov't Ex. 1.) Gardner was concerned that loose spoil material could roll down the hill and land on miners working the Parsons seam. (Tr. 25.) Gardner discussed Citation No. 6639078 with Haskel Wells, the day-shift foreman. (Tr. 25, 123–24.) During this discussion, Gardner told Wells that the loose spoil made the cited area unsafe for dozer operations, and a "dozer won't stay up there." (Tr. 32.) Wells said he would have employees "berm off" the area and "not work in that area no more." (Tr. 26.) Wells passed along this information to James "Mike" Thomas, president of Humphreys Enterprises. (Tr. 149–50.) The area was then bermed off. (Tr. 114, 124.)

During the conversation regarding Citation No. 6639078, Wells referenced a different area of the hill to the left of the cited area and asked Gardner if employees could continue stripping that area. (Tr. 28; Gov't Ex. 4.) Wells wanted to have a dozer bench this different area to prepare for further drilling and shooting. (Tr. 128–129.) Gardner inspected this different area of the hill, concluded it appeared to be safe, and told Wells the area was safe and that the operator could work there. (Tr. 28–29.) This different area had "natural ground" in that it was not covered in spoil. (Tr. 151.) Wells testified that Gardner had told him the operator must remove a group of trees in order to be allowed to work in the safe area. (Tr. 139, 142.)

After the berm had been built, Rex Strong, the day-shift dozer operator, spoke with Wells about the area cited as hazardous. Strong had been the dozer operator for the day shift at Humphreys for thirty-six years. (Tr. 112.) Wells wanted Strong to drive the dozer up an old logging road to the top of the hill then descend the hill in the dozer in order to remove a group of dead trees located just above the Parsons seam. (Tr. 31, 113.) Strong told Wells he did not feel

[3] "Spoil" or "shot rock" is material that has been loosened by strip mining operations. Essentially, spoil is loose, unstable earthen material that sits atop the unblasted or "natural" earth. (Tr. 31–32.)

[4] Citation No. 6639078 was settled prior to hearing as set forth in my Decision Approving Settlement in Docket No. VA 2009-68 dated June 24, 2010.

comfortable taking the dozer over that route, as he would have to drive over unstable spoil material.[5] (Tr. 113.) Wells then told Strong to take the dozer to the area above the Parsons seam. (Tr. 117–18). Strong was to use the dozer to bench an area above the Parsons seam. (Tr. 15, 151.) Strong followed these instructions and took the dozer to the top of the hill to search for the top of the Parsons seam. (Tr. 117–18.) In doing this, Strong stayed on natural ground and did not enter the area that had been cited as hazardous. (Tr. 116, 117–18, 154).

Billy Johnson, the night-shift dozer operator, took over operation of the dozer after Strong's shift ended. When Johnson arrived to work on the evening of August 26, Strong told Johnson (1) that he [Strong] had been asked to bench around the top of the Parsons seam and to remove some trees and (2) that Johnson should continue the work. (Tr. 95.) David Meade, the night-shift foreman, confirmed that Johnson was to bench around toward the Parsons seam and remove some trees with the dozer. (Tr. 96.)

The night of August 26–27 was dark and rainy, and a heavy fog rolled in, yet Johnson attempted to operate the dozer in compliance with Meade's directions. (Tr. 41, 104.) Johnson initially had trouble locating the Parsons seam; indeed, he called Strong at home that night and told him he had moved the dozer "a couple of hundred feet or further" from where Strong had stopped at the end of his shift, but he could not find the Parsons seam. (Tr. 98.) Strong told Johnson that the seam was probably farther up the hill. (Tr. 98–99.) Johnson believed Strong told him that he needed to be in the area where "overburden had been dumped and the trees were knocked down." (Tr. 99.) Johnson then moved the dozer up the hill and began benching around the area where the dozer eventually became stuck. (Tr. 101.) Johnson attempted to move a group of trees with the dozer's blade, but the trees would not move. Johnson repositioned the dozer and attempted to move the trees again. (*Id*.) He put the left side of the dozer blade against the trees and raised the blade. (Tr. 102.) As he accelerated forward, the dozer spun around so that it was parallel to the highwall. (*Id*.) The dozer slid roughly two feet. (Tr. 106–07.) Johnson then put the dozer in reverse, but the dozer tilted so that its base was uneven. (*Id*.) Johnson then concluded the dozer was stuck, so he put the dozer in park, gathered his belongings, and exited the dozer. (*Id*.) Though the dozer spun and tilted, Johnson testified that he never lost control of the dozer because the dozer was moving very slowly and he could anticipate how the dozer would react. (Tr. 103.)

Gary Ring, the night-shift coordinator, then left Wells a message during the night of August 26–27, informing Wells that "a tractor," the dozer, was stuck and that night-shift personnel were going to leave the tractor until morning. (Tr. 125–26.) When Wells arrived at work the next morning, he inspected the dozer Johnson had abandoned. (Tr. 126.) According to Wells, he "made sure it was in a safe area where I wasn't putting myself in peril" and then told

[5] Strong assumed that Wells meant he should use the shortest route from the logging road to the group of dead trees Wells wanted removed. (Tr. 115.) Taking the shortest route would cause Strong to drive through the area cited as hazardous. (Tr. 115–16.) Strong was never told by Wells to take that route, but Strong "assumed that would be the way [Wells] wanted me to go." (Tr. 115.)

the day-shift coordinator to send the backhoe to retrieve the dozer. (*Id*.) Wells and Strong, along with Steve Bolling, a member of the construction crew, attempted to remove the dozer using another tractor. (Tr. 127.)

Gardner returned to the mine on August 27 while Wells and his crew were attempting to recover the dozer.[6] (Tr. 128.) Gardner went to the top of the hill to the Morris seam level and spoke to Wells. (Tr. 34.) Gardner told Wells that the dozer was in the area Gardner had forbidden a dozer to go. (*Id*.) Wells asked Gardner if he was sure the dozer was in the cited area, and Gardner replied that he was sure. (*Id*.) Gardner then gave Wells a verbal order to cease operations in the area. (Tr. 35.) Additionally, Gardner testified that Thomas stated he was glad Johnson had not driven to the group of trees, as Thomas was sure the dozer could not "stay on there if he got in the trees." (Tr. 36, 62–63.) Thomas does not recall making this statement but did testify he was glad Johnson had not taken the dozer any farther because "it was in an area, he had gone too far south of where we really wanted to be." (Tr. 153.)

Gardner left the mine around 10:00 a.m. and returned around 4:15 p.m. (Tr. 37–38.) Thomas Bower, another MSHA inspector, returned to the mine with Gardner to assist with the investigation. (Tr. 84–85.) Gardner spoke with Wells shortly after Gardner returned to the mine. According to Gardner, Wells told Gardner, "Mike Thomas, the president, told me to put a dozer up there." (Tr. 38.) Thomas's request was not noted in the pre-shift report book, and Gardner told Wells to make a note of Thomas's statement.[7] (*Id*.) Wells agreed that the statement he wrote in the pre-shift report book was factually correct. (Tr. 132.) According to Wells, the instructions he received from Thomas were not incompatible with Gardner's order; that is, that Thomas instructed the dozer to work in an area deemed safe by Gardner. (Tr. 133.)

After concluding the investigation, Gardner issued Citation No. 6639082, alleging a violation of section 77.1005(a). (Gov't Ex. 1.) The citation states as follows:

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[6] The dozer was eventually removed on September 3, the next work day following the Labor Day holiday weekend. (Tr. 80–81.) Humphreys's workers first "ramped up" material below the dozer and then drove the dozer down the earthen ramp. (Tr. 155.)

[7] According to Gardner, Wells wrote a statement in the book and then showed it to Gardner. Wells wrote as follows:

> I was instructed by Mike Thomas to cut a bench around, above top Parson's to eliminate the trees from off the wall. I told Mr. Thomas that the Federal Inspector had written this section of wall, and we had barricaded by berm! He instructed Rex Strong to go above wall and start the bench to remove trees. He contacted me on company radio and instructed me to have second shift continue.

(Gov't Ex. 3.) Wells testified that Gardner "told me to put it in here, to word this the way I did. He said, 'this will cover you, by wording it, putting it in here in this form.'" (Tr. 132.)

> An unsafe act was conducted in a hazardous area when the certified foreman told the Dozer Operator . . . to cut a bench in the middle of a spoil pile above the existing highwall that was previously cited for hazardous conditions including loose unconsolidated material and overhanging trees directly above the Parsons Coal Seam. . . . A safe means was not provided for performing this work. The day-shift foreman was instructed not to have a dozer upon the loose material that it was not stable enough for a dozer to operate. The day-shift foreman stated that his supervisor Mike Thomas President of the Operations instructed him to put a dozer up on the dangerous spoil. During the time that the unsafe act was conducted a serious accident has occurred. The dozer operator lost control of his dozer while operating in this dangerous spoil in dense fog and rainy conditions. The dozer ended up sliding down to the edge of the top of the highwall where there is an approximate 50 ft. drop and ended up abandoning the dozer.

(Gov't Ex. 1.)

IV. Principles of Law

A. 30 C.F.R. § 77.1005(a)

Section 77.1005(a) states as follows: "Hazardous areas shall be scaled before other work is performed in the hazardous area. When scaling of highwalls is necessary to correct conditions that are hazardous to persons in the area, a safe means shall be provided for performing such work." 30 C.F.R. § 77.1005(a).

The Mine Act establishes strict operator liability for the conduct of individual miners and contractors. *See Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 155 (D.C. Cir. 2006) (rejecting operator's argument it cannot be held liable for an independent contractor's violations because Mine Act is a strict liability statute); *Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1272 (Oct. 2010) ("Because the Mine Act is a strict liability statute, an operator is liable if a violation of a mandatory safety standard occurs, regardless of the level of fault.") (citations omitted). The Commission has found that "operator[] fault or lack thereof, rather than being a determinant of liability, is a factor to be considered in assessing a civil penalty." *Asarco, Inc.-Nw. Mining Dep't*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff'd sub nom. Asarco, Inc.-Nw. Mining Dep't v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989).

B. Establishing an S&S Violation

The Commission has found that a violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish a violation as being S&S, the Secretary must show "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable

likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature." *Mathies Coal Co*., 6 FMSHRC 1, 3–4 (Jan. 1984). The Commission has held that "the inspector's independent judgment is an important element in making significant and substantial findings." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC at 825–26; *Mathies*, 6 FMSHRC at 5.

C. Establishing Unwarrantable Failure

In *Emery Mining*, the Commission defined unwarrantable failure as "aggravated conduct constituting more than ordinary negligence." 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003–04; *San Juan Coal Co.,* 29 FMSHRC 125, 128 (March 2007); *Rochester & Pittsburgh Coal Co*., 13 FMSHRC 189, 194 (Feb. 1991).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist. *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). These factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *San Juan Coal Co.*, 29 FMSHRC at 128, *citing Consolidation Coal Co*., 23 FMSHRC at 593. All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

V. Legal Analysis, Further Findings of Fact, and Conclusions of Law

A. Violation of 30 C.F.R. § 77.1005(a)

Section 77.1005(a) has several requirements. In order for a violation to have occurred, the area must have been hazardous. The Secretary must then show either (1) that work was performed in the hazardous area before the area was scaled, or (2) though the hazardous area was scaled, no safe means to and from the hazardous area was provided.

In this case, the cited area on the hill was hazardous. Gardner had issued Citation No. 6639078 because an area in between the Parsons seam and the Morris seam was unsafe. (Tr. 23; Gov't Ex. 1.) The cited area was covered with spoil and dead trees. (Tr. 18; Gov't Ex. 6.) The loose spoil material could fall down the hill and strike workers, and the spoil material also made the area unsafe for dozer operations. (Tr. 25, 32, 86–87, 113.) In addition, the highwall at the bottom of the hill created a ledge with a fifty-foot drop. (Tr. 48.)

The dozer was also in the hazardous area before the area was scaled. Gardner, Johnson, and Thomas all concluded that the dozer was located in the hazardous area. (Tr. 34, 99, 154.) Their testimony is corroborated by Government Exhibits 5, 6, and 7, which show the dozer was abandoned on a part of the hill that was steeply slanted and covered in loose spoil material.[8] Evidence showing the dozer in the hazardous area was uncontested by Humphreys.[9] The evidence also shows that the dozer was being used to bench an area of the mine site in order to continue mining. (Tr. 117, 150.) Based on the evidence, I find that Johnson was instructed to use the dozer to bench towards the top of the Parsons seam and was not instructed to use the dozer to scale the area cited as hazardous. Nonetheless, the dozer was found in the hazardous area and had been performing work other than scaling. Therefore, I conclude that a violation of section 77.1005(a) occurred.

Alternatively, even assuming the dozer was being used for scaling the hazardous area, a safe means for performing such work was not provided. The inspectors and miners agreed that the loose spoil material made the area unsafe for dozer operation. (Tr. 32, 113.) Those fears proved to be well founded; when Johnson took the dozer into the hazardous area, the dozer spun around, slid two feet down the hill, and got stuck. (Tr. 102–07.) Because the dozer could not operate safely within the hazardous area, a safe means of access was not provided for any scaling activities that took place, thus establishing a violation of section 77.1005(a).

B. S&S Determination

As articulated above, the violation of section 77.1005(a) establishes the first element of the *Mathies* test for an S&S violation. Therefore, to establish that the violation was S&S under the Mine Act, the Secretary must show a discrete safety hazard contributed to by the violation, and a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature.

The Secretary has provided evidence to show that operating the dozer in the cited area contributed to a discrete safety hazard. Gardner, Strong, and Thomas all testified that operating a dozer in the hazardous area was unsafe. (Tr. 32, 52, 114, 153.) The loose spoil material did, in fact, impede Johnson's operation of the dozer on the night shift. I therefore determine that the Secretary has established that the violation contributed to a discrete safety hazard.

[8] Government Exhibit 5 is a picture taken during the retrieval of the dozer. The road that is depicted in Government Exhibit 5 was built during the retrieval process and was not there when the dozer was abandoned. (Tr. 155.)

[9] While Wells stated he believed he was not in danger when inspecting the abandoned dozer, he did not testify that the dozer was not in an area in which the slant of the hill and the loose material covering the ground made mining operations hazardous. (Tr. 126.) Moreover, Wells appears to have been confused as to what area Gardner had cited as hazardous. When Gardner told him the dozer had been abandoned in the area he cited as hazardous, Wells asked whether Gardner was sure. (Tr. 34.)

The Secretary has also shown that operating the dozer in the cited area was reasonably likely to result in a serious injury. Gardner testified that it was "highly likely" that the dozer would slide down the hill and fall off the high wall, or that the dozer operator would be struck by loose spoil material. (Tr. 52.) Gardner testified that the risk of accident was highly likely because of the conditions in which the dozer was being operated, including the fact that it was a dark and rainy night, the dozer operator was shrouded in fog, and the dozer operator could not see what the material above him was doing. (*Id*.) Based upon his experience investigating accidents where dozers have fallen off highwalls, given the fifty-foot drop, Gardner concluded that the dozer operator could have been killed if his dozer "came off the wall." (Tr. 47–48.) Gardner has also seen injuries such as punctured lungs, head injuries and broken limbs in similar accidents.

Considering all of this, I conclude that the violation of section 77.1005(a) was S&S.

C. Negligence and Unwarrantable Failure Determination

After considering the evidence presented in this case, it appears that Johnson's presence in the cited area was due to his failure to fully comprehend where he was operating the dozer and his misunderstanding of where he was in relation to the area cited as hazardous. Simply put, Johnson got lost, and ended up in the cited area.

Gardner told Wells that Wells could have employees work in an area near the area Gardner had cited as being hazardous. Gardner initially told Wells that the area covered in spoil was hazardous. Wells agreed to keep employees out of the hazardous area; this agreement was underscored by the fact that he had the area bermed off during the day shift. (Tr. 26, 114.) Gardner then spoke to Wells about a different area of the mine and told Wells it was safe to use a dozer to bench an area near the cited area. (Tr. 28–30.) At the hearing, Gardner pointed out this safe area as "to the far left" and near the clump of trees in Government Exhibit 7. (Tr. 28; Gov't Ex. 7.) Upon examining Government Exhibit 7, as well as Government Exhibits 4 and 6, the area where Gardner told Wells he could work is to the left and relatively close in distance to the area cited as hazardous. After being informed of Wells's discussion with Gardner, Thomas told Wells to instruct the dozer operators to work in the area Gardner had said was safe, the area with natural ground, situated above the area cited as hazardous.[10] (Tr. 151.) Thomas's account is corroborated by Strong. Strong was instructed to bench the top of the Parsons seam, which he did during the later part of his shift. (Tr. 116–17.) Strong was aware of what constituted the area cited as hazardous, as he had constructed the berm during the first part of his shift. While

[10] This is notwithstanding Wells's statement, as recorded in the pre-shift book, that Thomas ordered Wells to put a dozer in the area above the highwall. The statement as written in the pre-shift book is not dispositive, as it does not speak to whether Thomas told Wells to put a dozer in the area cited as hazardous. The statement in the pre-shift book merely says that Thomas instructed Strong to go farther up the hill than where the cited area was located and to bench the area. This account is consistent with Strong's and Wells's sworn testimony at hearing that Thomas instructed the dozer to bench the area designated as safe by Gardner.

operating the dozer to bench the top of the Parsons seam, Strong stayed on natural ground and did not enter the cited area. (*Id*.)

If this story closed with the end of Strong's shift, then no violation would have occurred. However, Johnson took over dozer operations and attempted to continue Strong's work. Shortly after arriving to work for his shift at 4:30 p.m., Johnson spoke to Strong and Meade; both men told Johnson he was to bench toward the top of the Parsons seam. (Tr. 95–96.) Johnson then worked the dozer in a "hollow" beyond the area depicted by the exhibits presented at trial. (Tr. 98.) Afterwards, he operated the dozer for a period of time without being able to find the Parsons seam. (*Id*.) Johnson called Strong at night and told Strong he had been unable to find the Parsons seam, though he had moved a "couple of hundred feet or further" from where Strong had been operating the dozer. (*Id*.) It appears that Johnson was farther down the hill than he thought, as he asked Strong whether the Parsons seam could be located farther up the hill. (*Id*.) Strong agreed with Johnson and told him that the Parsons seam probably was located farther up the hill. (*Id*.) Johnson then began moving the dozer up the hill. While he was speaking to Johnson before his shift, Strong told Johnson he was also to remove some trees.[11] (Tr. 95.) When Johnson moved the dozer up the hill that night, he saw a group of trees located next to where the dozer was eventually abandoned. Johnson believed this group of trees to be the trees he was told by Strong to remove. (*Id*.) It was only then, after Johnson had attempted to find the Parsons seam, moved several hundred feet from where Strong had been working, and mistakenly identified a group of trees, that Johnson entered the hazardous area and the dozer became stuck.

Considering this evidence, I conclude that the Secretary has not established the violation was the result of Respondent's unwarrantable failure. In reaching this conclusion, I do not take lightly the evidence presented as to the real danger that existed that night. The violative condition of unstable spoil was extensive and posed a high degree of danger for the dozer operator. It is beyond dispute that Gardner told Wells that a dozer should not be operated in the hazardous area. (Tr. 32.) Also, both dozer operators expressed concern over the idea of operating the dozer on the spoil material. (Tr. 86, 114.) Additionally, as noted above, the violation could reasonably result in a serious injury or death from a possible fifty-foot fall off the top of the highwall. However, the operator was not placed on notice that greater efforts were necessary for compliance, nor did the operator have knowledge of the existence of the violation, as Humphreys bermed off the area in order to comply with Gardner's instructions to keep workers out of the hazardous area. I determine that Humphreys did not have knowledge that Johnson was operating the dozer in an unsafe area until the operator learned that the dozer was stuck and had been abandoned in the cited area.

I also determine that the Secretary has not shown that the violation existed for a significant length of time. As detailed above, Johnson spent a relatively small part of his shift searching for the Parsons seam outside of the hazardous area. Moreover, both Gardner and

[11] Gardner had told Wells that it was safe to bench near a group of trees. (Tr. 28.) Additionally, Wells testified that Gardner told them they must remove a group of trees from the safe area. (Tr. 139, 142.)

Strong agreed that a dozer could not safely operate in the cited area due to the presence of spoil material. Gardner and Strong were both proven correct, as the dozer spun, slid and became stuck when Johnson mistakenly entered the cited area. I therefore find that the violation did not exist for a significant period of time.

Additionally, it is undisputed that the operator immediately worked to abate the violative condition. Gardner testified that, when he arrived at the mine and saw where the dozer was abandoned, he instructed Wells to cease operations on removing the dozer. (Tr. 34–35.) Humphreys eventually built an earthen road, and the dozer was safely driven down the mountain in accordance with an action plan submitted to MSHA. (Tr. 155; Gov't Ex. 3 at 2.) I find that the operator took every effort to safely abate the violation.

Considering all of these factors, I determine the Secretary has not shown that Humphreys exhibited the kind of reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care that amounts to unwarrantable failure. Therefore, I conclude that the violation was not the result of the operator's unwarrantable failure.

However, Gardner determined the violation was a result of high negligence, and the evidence supports his determination. The night of August 26–27 was dark and rainy. (Tr. 41, 104.) The presence of fog was not uncommon at the strip mine, especially during or after rain (Tr. 79); and a dense fog did, in fact, cover the area while Johnson was operating the dozer. (Tr. 48, 104.) Moreover, Wells had been warned specifically that the loose spoil made the cited area unsafe for dozer operations. (Tr. 32, 113.) Knowing all of this, Thomas, Wells, and Meade still instructed the dozer to operate in the "safe" area near the cited, hazardous area on a rainy night made darker and more dangerous by clouds and dense fog. A reasonable operator should have known that these dark, wet conditions would make it difficult for any dozer operator to distinguish between the safe and unsafe areas on the hill. Ordering Johnson to work in such conditions, while knowing a mistake could result in the possibility of a fifty-foot fall with a piece of heavy equipment, should have been enough for Humphreys's management to exercise more caution while Johnson was working near the cited area. Indeed, Johnson was concerned enough about where he was asked to work that he called Strong, the day-shift dozer operator, to double check where he should be working. Management failed to take reasonable measures to ensure Johnson worked in the correct area. I therefore determine that Humphreys demonstrated a high degree of negligence with regard to this violation.

D. Penalty

Section 110(i) of the Mine Act gives the Commission authority to assess civil penalties. 30 U.S.C. § 820(i). The Mine Act requires the Commission and its Judges to consider the following six factors when assessing a civil penalty: (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the operator's business, (3) the negligence of the operator, (4) the effect of the penalty on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's demonstrated good faith. *Id*.

The Secretary has directed my attention to MSHA's Data Retrieval System for evidence regarding Humphreys's history of violations. (Pet. for Assessment of Civil Penalty 2.) MSHA's Data Retrieval System shows twenty-eight violations over a fifteen-month period preceding this violation, fourteen of which were assessed as S&S violations. None of these previous citations alleged the standard breached in Citation No. 6639082. In considering this history along with the other statutory factors, I take special note that the Secretary established this section 77.1005(a) violation was the result of Humphreys's high degree of negligence. I have also noted that Humphreys presented no evidence that this penalty will affect its ability to continue in business. Therefore, I conclude that a penalty of $30,000.00 is appropriate given the violation history, the size of the mine, Humphreys's high negligence, this violation's serious gravity implicating the risk of fatal injury, and Humphreys's good faith abatement of the violation. Accordingly, I hereby assess a civil penalty of $30,000.00.

VI. Order

In light of the foregoing, it is hereby **ORDERED** that Citation No. 6639082 be modified to a section 104(a) citation, thus removing the unwarrantable failure designation. It is further **ORDERED** that Citation No. 6639082 is affirmed in all other respects.

Within 40 days of the date of this decision, Humphreys is **ORDERED** to pay a civil penalty of $30,000.00

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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December 22, 2011

JIM WALTER RESOURCES, INC., Contestant,	:	CONTEST PROCEEDING
	:	Docket No. SE 2011-407-R
	:	Order No. 7699793; 02/14/2011
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	:	Mine: No. 7 Mine Mine ID: 01-01401

DECISION

Appearances: Carla Casas, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia for the Respondent,.
John Holmes, Maynard, Cooper and Gale, P.C. Birmingham, Alabama for the Contestant.

Before: Judge Miller

This case is before me upon Contestant's request for a hearing to challenge Order number 7699793 issued by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Jim Walter Resources, Inc., pursuant to sections 105 and 107 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or the "Mine Act"). The parties presented testimony and evidence at a hearing held on November 9, 2011 in Birmingham, Alabama.

I. STATEMENT OF FACTS

Jim Walter Resources, Inc. ("JWR") operates the No. 7 Mine, an underground coal mine located in Brookwood, Alabama. The parties have stipulated that the mine is subject to the jurisdiction of the Mine Safety and Health Act of 1977, as amended, that JWR is an operator of a coal mine, and that the ALJ has jurisdiction to hear this matter. Sec'y Stip 1-7; (Tr. 9). The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act, 30 U.S.C. § 813(a), as well as five day spot inspections due to the quantity of methane liberated at the mine. (Tr. 34).

On February 14, 2011, MSHA inspector Alveriado Lee Getter issued imminent danger order number 7699793, as follows:

> This imminent danger order is issued to remove all mine personnel from the area of the last open crosscut intersection (spad 23456) in the No. 2 entry of the No. 8 section (MMU-008-0). When checked a cavity in the roof measuring approximately 10 feet wide by 15 feet long with a smaller cavity in the very top measuring 3 feet in diameter by 18 inches deep allowed methane levels to reach 5.6%. Power was immediately removed from the section and all miners were removed from the area except those needed to improve ventilation.

In addition to the imminent danger order, Getter simultaneously issued a citation for a violation of the ventilation control plan. JWR did not contest the S&S violation that was issued and, therefore, JWR has agreed that an S&S violation ocurred as a result of the conditions observed by Getter. Sec'y Ex. 2; (Tr. 22-23, 32). Hence, the mine has conceded that, as a result of the violation, which led to a methane accumulation, there was a reasonable likelihood that a serious injury would occur. However, the mine does not admit that an imminent danger existed. There is no dispute that the level of methane, 5.6 percent, was present as set forth in Getter's order. (Tr. 24)

Inspector Getter is currently an acting field office supervisor. Prior to such, he worked at the MSHA district office as a ventilation specialist, where he reviewed ventilation plans and worked with mines on issues involving ventilation and bleeder systems. He has been an inspector with MSHA for six years. He has had regular inspector training, accident investigation training, and annual ventilation training. He has conducted many inspections at the JWR mines, particularly the No. 7 mine, and is familiar with the ventilation plan for the JWR No. 7 mine.

The JWR No. 7 mine is a gassy mine that liberates more than one million cubic feet of methane in a 24 hour period and, as a result, is on a five day spot inspection. (Tr. 34). The mine has had a problem with ignitions, particularly in the one year period preceding the subject imminent danger order issued by Getter. Getter was aware of the prior ignitions at the mine as a result of discussions held in the MSHA office. Consequently, there was a heightened awareness at the mine due to the frequent, unforeseen ignitions of methane. The ignitions, which began in January 2010, continued until the date of the order on February 14, 2011. Sec'y Ex. 5. Five ignitions, which occurred within a short period of time, were caused by the continuous miner drilling into hard rock in the No. 8 section. (Tr. 44).

Getter was at the No. 7 mine on February 14, 2011 to conduct a spot inspection and, after reviewing the books and speaking with representatives of the mine, he traveled to the area where production was scheduled for the day. Vicki Dempsey, a health specialist, was also at the mine for the purpose of collecting dust samples in the production area of the No. 8 section. As Getter

approached the No. 8 section, he could hear the energized continuous miner and observed that there was a miner operator, a helper, an electrician, two roof bolters, two shuttle car operators, and a supervisor; at least 10-12 persons, working in the area. The continuous mining machine was at the face of the No. 2 entry, and the roof bolter was nearby in the last open crosscut between the Nos. 2 and 3 entries. Getter created a diagram in his inspection notes that depicts the location of the various pieces of equipment in the area. Sec'y Ex. 1 p. 4; (Tr. 50-51).

As Getter initially entered the area, he noticed that, due to sloughing, there was a loose rib with a dangling pin. He advised the miners on the section to have a look at the loose area before it became a hazard and a possible violation. (Tr. 51). The supervisor agreed and instructed the operator to back the miner out of position at the face in order to allow the roof bolter to pass. Once the continuous mining machine was backed out, Getter noticed and then approached a roof cavity that was located just behind where the miner had been, near the intersection, about 40 feet back from the face. Getter asked the miner operator to use his probe to take an air reading in the cavity. The cavity was 15 feet by 10 feet wide, and contained another smaller cavity within it that was approximately 18 inches deep. (Tr. 52). In the area where the miners were working, the distance to roof line was approximately 7 to 7 $^{1}/_{2}$ feet, and the cavity at the farthest point was 13 feet above the floor. Simple math indicates that the depth of the cavity was about 5 $^{1}/_{2}$ feet, with 18 inches of that amount in the upper cavity.

The miner operator raised the big-face methane detector and, before extending very far into the first, larger cavity, the methane reading shot up to 4.6 percent. The miner operator quickly pulled the probe back in order to avoid the possibility of burning out the detector in the face of quickly rising gas levels. The miner operator attempted a methane reading twice. The first time he attempted a reading, the probe was about half way into the main cavity when it shot up. The second time, the detector was pushed to the edge of the second cavity, which would have been about four feet above the roof line, and the reading showed at least 5.6 percent methane. Getter observed a greater reading at one point but settled on the 5.6 percent methane concentration, as observed by the miner operator. (Tr. 58). Getter testified that he observed a higher reading and he believed that the methane may have actually been at a greater level due to the height of the cavity. He confirmed his belief with a bottle sample that showed a methane level of 9.110 percent. Sec'y Ex. 3; (Tr. 68).

Getter explained that a methane concentration over 5 percent is in the explosive range. While methane may ignite at 1 percent, things change dramatically when the reading is over 5 percent. There is no longer simply a danger of ignition. Rather, there is the potential to ignite an explosive mixture of methane and other gasses. With the high level of methane, everything becomes an ignition source. Getter explained that all that is needed for ignition is the slightest friction; even clothing static. (Tr. 60-61). The atmosphere is fragile in that range and when it is in the last open crosscut, with men and equipment working and actively mining, the danger is great. The working face was 40 feet from explosive mixture, and the mining machine was prepared to begin cutting coal. The continuous miner alone has many moving parts that are a source of sparks and heat. The roof bolter is the same, and it was energized and moving through the area to begin roof bolting a rib, the process of which can also be a source of sparks. If the

bolter had pinned the area pointed out earlier by Getter, it would have been operating "right next to this pocket of methane." (Tr. 63). In fact, Getter explained, the roof bolter is known to be one of the primary sources of ignitions in underground coal mines. Moreover, the last open cross cut is the busiest area, with many miners traveling in, out, and through the area, and is also an area with energized equipment and cables. A fall of roof can also serve as a source of ignition. Notably, a fall, which created the cavity, had occurred within the previous few days. Getter described the scene as "very volatile" and sensitive; "a ticking time bomb." (Tr. 64). As a consequence, Getter verbally issued an imminent danger order, instructed the supervisor to power down the entire section and, with the exception of those needed to dilute the methane and return the section to a safer environment, removed the miners from the section.

The crew began working to re-ventilate the cavity area and, in doing so, took a number of methane readings, all of which indicated methane at explosive levels. The mine eventually had to loosen the curtain that had been directing air to the cavity and place an additional piece of curtain to circulate an even greater volume of air up to the roof. With the additional ventilation to dilute the air in the cavity, it took approximately two hours to dilute the methane levels to below 1 percent.[1]

The mine operator called a number of witnesses to describe what occurred during Getter's inspection. For the most part, the witnesses agreed with Getter and with the fact that there was an explosive mixture of methane in the roof cavity. The witnesses explained that, as a result of a roof fall, the cavity had developed within the previous few days, and that on the shift prior to the subject shift the miners had problems with the methane concentration in the cavity. (Tr. 158, 202) A blower curtain had been installed to divert air to dilute the methane in the cavity. (Tr. 160). The witnesses explained that at least a portion of the cavity was rock, as opposed to coal, and at no time did a methane alarm sound. Moreover, they testified that there was not a concentration in the explosive range below the roof line of about seven feet off the floor.

The JWR witnesses disagreed with Getter on how far into the cavity the monitor was placed before an explosive range of methane was detected. For example, the section coordinator, Woods, testified that he observed no elevated methane above 1 percent at the roof line, and that the higher concentrations were not reached until the probe entered the higher, smaller cavity, which would have been four feet above the roof line. Woods, who was responsible for checking the area prior to mining, had not used a probe on the preshift examination to check inside the cavity, but instead simply reached up as high as he could, maybe

[1] At one point the mine put forth the theory that one side of the curtain had been pulled down by the continuous miner ten minutes prior, thereby raising the methane levels to the explosive mixture observed by Getter. Given that it took nearly two hours and a new piece of curtain to reduce the levels below 1 percent, I give no credence to that theory.

7 or 8 feet off the ground, and found no methane problems. (Tr. 167). Still, Woods agreed that the methane levels were high and increased as the probe was lifted into the cavity. Langford, the miner operator, testified that he did his regular methane checks prior to starting the continuous miner and did not hear or see any alarm from a methane monitor on the day of the order. He agreed with Woods that the methane concentration was less than 1 percent below the roof line and that it went up to 4 or 5 percent in the upper cavity. Langford stood on the miner to take methane readings in the cavity as the miners attempted to dilute the methane, but it appears that no one measured the methane in the cavity prior to Getter's arrival. Finally, the safety supervisor, Al England, disagreed with the designation of the situation as an imminent danger. He was not aware of any ignition sources, and the methane below the roof line was within permissible range. (Tr. 228). According to England, he observed the readings within the explosive level only after the readings were taken in the upper cavity. England further testified that, after learning of the 4.6 percent reading, he instructed the miner helper to go back to the power center and "get somebody to knock the power off to the section . . . ." (Tr. 228). England believed that he took the action prior to the issuance of the 107(a) order by Getter.

Finally, the witnesses for JWR testified that they did not observe problems with the cables on the section or the continuous mining machine that would lead them to believe a spark would be generated. They did agree that a number of occurrences in the area, like cutting into rock or having an antenna scrape on the roof, or even a roof fall, can lead to an ignition. The three witnesses called to testify on behalf of JWR explained that, in their recollection, the section had not yet cut coal when Getter arrived. However, it is undisputed that the equipment was energized and the mine was preparing to produce coal. (Tr. 163) ("by the time we got ready to start running . . .").

II. DISCUSSION AND CONCLUSIONS OF LAW

On February 14, 2011, Inspector Getter issued Section 107(a) withdrawal, first verbally, and then Order No. 7699793 directing Jim Walters to cease mining operations in the referenced areas upon the basis of a measured methane concentration of 5.6 percent inside a roof cavity. The top of the cavity was located approximately 13 feet above the ground, and the distance from the ground to the primary roof line was 7 to 7 $^{1}/_{2}$ feet, leaving a cavity of about 5 $^{1}/_{2}$ feet above the roof line. Section 107(a) of the Mine Act provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions

> or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

30 U.S.C. § 817(a). Section 3(j) of the Act defines "imminent danger" as the "existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). As previously noted, Section 107(a) of the Act provides for the issuance of an order requiring the withdrawal of persons in areas of a mine who are exposed to such an imminent danger.

> Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Act or the Secretary's regulations. This is an extraordinary power that is available only when the "seriousness of the situation demands such immediate action."

Utah Power & Light Co., 13 FMSHRC 1617, 1622 (Oct. 1991) (*quoting* Sen. Rep. No. 91-411, *reprinted in* Senate Subcomm. On Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 215 (1975).

An imminent danger exists "when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Eastern Associated Coal Corporation v. IBMA*, 491 F.2d 277, 278 (4th Cir. 1974). The Seventh Circuit adopted the same interpretation in *Old Ben Coal Corp. v. IBMA*, 523 F.2d 25, 33 (7th Cir. 1975). *See also Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (*quoting Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)). While the concept of imminent danger is not limited to hazards that pose an immediate danger, "an inspector must 'find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time.'" *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 555 (Aug. 2006) *(quoting Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991)). Inspectors must determine whether a hazard presents an imminent danger without delay, and a finding of an imminent danger must be supported "unless there is evidence that [the inspector] had abused his discretion or authority." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2164. While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. An inspector must make a reasonable investigation of the facts, under the circumstances, and must make his determination on the basis of the facts known, or reasonably available to him. *Island Creek Coal Co.*, 15 FMSHRC 339, 346-347 (March 1993).

An inspector "abuses his discretion . . . when he orders the immediate withdrawal of miners under section 107(a) in circumstances where there is not an imminent threat to miners." *Utah, Power & Light Co.*, 13 FMSHRC at 1622-23. In assessing an inspector's exercise of his discretion, the focus is on "whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported the issuance of the imminent danger order." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992).

In this case, Inspector Getter had inspected the No. 7 mine many times and was aware of the unusual number of ignitions at the mine in recent months and particularly in the No. 8 section. He is a ventilation expert, and is aware that methane above 5 percent is volatile and explosive. Moreover, he was aware of the number of ignition sources in the area, including the energized continuous miner that either had been cutting at the face or was about to cut into the face, the energized roof bolter, the shuttle cars, and the energized cables. He believed, as he described on cross examination, that the cables have been known to create an arc that reaches as high as the roof. He also explained that static from clothes can act as a source of ignition. Getter was not aware that the machinery in the area had been inspected the night prior and no citations were issued for permissibility violations. However, even if he had known, he opined that it would have no effect on his reasoning regarding the imminence of the situation given the many pieces of machinery in the immediate area that were energized and moving. Getter also considered that cutting coal creates a source of ignition, as does roof bolting and loading coal into the shuttle cars. He reasoned that all these processes generate heat and are ignition sources for an explosive mixture of methane. Finally, Getter believed that the 5.6 percent was only the beginning, and that the mixture was of a greater concentration closer to top of the roof cavity. The explosive mixture of methane was located very near the face, in the area where there were many possible sources of ignition which would create an explosion. I find Inspector Getter to be convincing, reliable, and objective in his reasoning and more credible than any witness presented by the mine operator. I find his conclusions regarding the condition of the section and the volatile nature of the methane to be well reasoned and based upon his knowledge of the area and the volatile nature of methane at explosive levels. Getter adequately examined the area in order to gather sufficient evidence to reach his conclusion and issued the order based upon his good faith belief that in the continued course of mining, the methane would be part of an explosion that would lead to serious and fatal injuries. I agree with Getter that the seriousness of the situation demanded immediate action from the inspector. Hence, I find that the imminent danger order was properly issued.

The mine raises two primary arguments to dispute the issuance of the order. First, it argues that there was no imminent danger because there were no ignition sources, and even if there were, the methane reached the explosive range only in the highest portion of the cavity, i.e., about 11 feet above the floor and beyond the reach of the possible sources of ignitions. Second, the mine argues that the order is redundant because the mine would have had to remove men and power from the section in order to comply with 30 C.F.R.§ 75.323, which requires mine operators to de-energize equipment, withdraw workers, and make ventilation changes if methane at 1.5 percent is discovered. In raising this argument, JWR relies on Woods' testimony that,

given the level of methane, he removed the men from the area because he is required to do so by regulation.

First, although JWR admitted a significant and substantial violation occurred as a result of the methane in the cavity, it denies that there was an ignition source nearby and, therefore, it argues that there was no "imminence" to the danger. While Getter testified that he heard the continuous miner operating as he entered the section, the witnesses for the mine testified that they had not yet started coal production when Getter arrived, but they were preparing to do so. The cavity was located near the No. 2 entry, in a very busy area, with equipment moving through, a continuous miner prepared to cut coal, and a roof bolter prepared for operation. There were shuttle cars being operated, and a flow of men and machines was moving through the area. The mine denies that any of these constitute a possible ignition source, or at a minimum, the ignition source would not reach the explosive mixture of methane above the roof line in the cavity.

The mine argues that all equipment was in permissible condition, that the energized cables were not in an area near enough to the methane, and it was not likely that an ignition would occur. The mine cites *Island Creek Coal Co.*, 15 FMSHRC 339 (1993), for the proposition that an ignition source must be present to support an imminent danger order. While, the mine does not deny that ignition sources may have been present in the No. 8 section, it is the mine's position that none of those sources would be exposed to the high level of methane in the cavity and hence the exposure required by *Island Creek* is not proven in this case. First, I disagree factually that the methane in the cavity is too remote to be exposed to an ignition source. The air in the cavity was not being adequately diluted, as is evidenced by the high levels of methane that remained. Given the continued course of mining, the methane would have migrated to other areas, pushed along by air that was not able to adequately dilute the mixture. Although the electrical cables were on the ground, the other equipment, particularly the roof bolter, was or would shortly have been, working at the roof level, very near to the elevated methane levels.

The Secretary argues, and I agree, that the *Island Creek* decision is a narrow one and should not be relied upon for the proposition put forth by JWR. The Commission clearly explained that the *Island Creek* decision was limited to the facts of that case as they related to methane levels in the gob. In this case, unlike *Island Creek*, the methane levels were found very near the working face, with many machines and miners traveling and working in the area. In addition, Getter credibly described the many possible ignition sources he observed and, in his experience, those ignition sources, mixed with the high concentration of methane, were a formula for an immediate, life-threatening event.

Next, the mine argues that Getter abused his discretion because the mine was required to withdraw from the area once the methane reached 1.5 percent. It is the position of JWR that since 30 C.F.R § 75.323(b)(2) requires the mine to withdraw persons working at the face back to the last open crosscut and de-energize equipment if a methane level of 1.5 percent or greater is

discovered, there was no need for an imminent danger order. I disagree with the reasoning of the mine.

The Commission and Courts have held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated. *See Rochester & Pittsburgh Coal Company v. MSHA*, 11 FMSHRC 2159, 2163. Courts have interpreted the definition of imminent danger to exclude consideration of abatement time. Judges should analyze hazards without assuming that they will be automatically abated. *Id.* The very case upon which the company relies for its explanation of 107(a) outlines the precautionary principle at work in that section of the Mine Act, holding that "the removal of miners from the perceived imminent danger is the paramount concern." *Wyoming Fuel Company*, 14 FMSHRC 1282, 1292. Hence, even if there is a regulatory standard that requires withdrawal from the area, using the tool of an imminent danger order is not an abuse of discretion.

I do not agree that JWR was in the process of removing power or men from the area when the verbal order was issued by Getter. However, even if they were in the process of abating the violative condition, Inspector Getter was justified in issuing the imminent danger order in the interests of protecting them from the danger he observed. First, Getter was not aware, and saw no evidence at the time he issued the order, that miners were being voluntarily withdrawn from the area. Next, Getter explained that the standard's requirement to withdraw miners is a burden on the mine operator, and not on the inspector. That standard is directed to the mine operator, and the role of the inspector is to issue a citation or order if the mine does not comply. Here, Getter issued no such citation and, therefore, it cannot be said that duplicative citations were issued. The *Western Fuels* case cited by JWR is instructive in this regard. In that case the Commission determined that citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-04 (June 1997) *(citing Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Southern Ohio*, 4 FMSHRC at 1462-63; *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)). Here, the imminent danger authority granted by the Act, and the requirement of the standard to withdraw miners, impose separate duties on the operator and MSHA, and not on the operator alone. Thus, the responsibilities are not identical and are directed at different entities.

Finally, I find that Getter issued the imminent danger order based not only on the level of methane, but also the ignition sources and the exposure to miners. He did not, as the mine asserts, use a *per se* rule of 5 percent methane. Consequently, I find no need to address the argument that using a *per se* rule is an abuse of discretion. Also, in reaching my decision upholding the imminent danger order, I did not find the history of assessed violations to be relevant and did not rely upon that exhibit except to confirm the assertions of JWR that they had not received any permissibility violations during an inspection conducted the day prior to this one. *See* Sec'y Ex. 6; (Tr. 18-19). Instead, I credit the testimony of Inspector Getter and rely upon his observations at the time, his knowledge of methane and the conditions of the mine, and his understanding of the importance of immediately removing men from the area given the dangers he observed. For the above stated reasons, I find that the Secretary has demonstrated by a preponderance of the evidence that Getter did not abuse his discretion and the imminent danger order stands as issued.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, D.C. 20001

December 27, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 2009-1368 A.C. No. 15-18839-189764
v.	:	
EXCEL MINING, LLC Respondent	:	Van Lear Mine

DECISION

Appearances: Angele Gregory, Esq., and Alisha Wyatt, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
Gary D. McCollum, Esq., Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for a civil penalty filed by the Secretary of Labor ("Secretary"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 *et seq.,* ("Act") charging Excel Mining, LLC. ("Excel") with two violations of mandatory standards and proposing civil penalties of $49,039.00 for those violations. Since Excel admits the violations, the general issue remaining is the appropriate civil penalty to be assessed for those violations. Additional specific issues are addressed as noted herein.

Citation Number 8224945, issued at 12:30 p.m. on May 11, 2009 pursuant to section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. §75.507-1(a) and charges as follows:[1]

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[1] Section 104 (d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area (continued...)

> The explosion proof enclosure for the #3 P-40 de-watering pumps located in the return air course approximately 60 feet from the VL-2 seals is not being maintained in a permissible condition. The following conditions exist. 1. No packing material is provided in the stuffing box of the packing gland for the 8/5 awg cable being used to supply power of 575 volts to this explosion proof enclosure, allowing the power cable to move freely through the packing gland thus exposing the electrical circuits in this explosion proof enclosure to the mine atmosphere. 2. A device is not provided to secure the packing nut of the stuffing box from loosening. These conditions exposes [sic] miners to dangers of burns and /or smoke inhalation from a methane explosion. A agent of the operator has been making the weekly examinations of this pump installation and this installation has been in service for at least a month. The examiners (who are agents of the operator) engaged in aggravated conduct constituting more that [sic] ordinary negligence in that the packing glands on the explosion proof enclosure were not packed with packing material. This violation is an unwarrantable failure to comply with a mandatory standard. This mine has a history of methane gas and this pump installation is located approximately 60 feet from a sealed area.

Order Number 8224946, issued at 12:41 p.m. on May 11, 2009 pursuant to section 104(d)(1) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R. §75.507-1(a). The order charges as follows:

> The explosion proof enclosure for the #2 P-70 de-watering pump located in the return air course approximately 60 feet from the VL-2 seals is not being maintained in a permissible condition. The following conditions exist. 1. No packing material is provided in the stuffing boxes of the packing glands for the cables being used to supply power of 575 volts to this explosion proof enclosure and the P-70 pump, allowing the power cable to move freely through the packing gland thus exposing the electrical circuits in this explosion proof enclosure to the mine atmosphere. 2. A device is not provided to secure the packing nuts of the stuffing boxes from loosening. These conditions exposes [sic] miners to the dangers of burns and/or smoke inhalation from a methane explosion. An agent of the operator has been making the weekly examination of this pump installation and this installation has been in service for at least one month. These conditions exposes [sic] miners to the dangers of burns and/or smoke inhalation from a methane explosion. An agent of the operator has been making the weekly examination of this pump installation and this

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[1](...continued)
affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

> installation has been in service for at least one month. The examiners (who are agents of the operator) engaged in aggravated conduct constituting more that ordinary negligence in that the packing glands on the explosion proof enclosure were not packed with packing material. This violation is an unwarrantable failure to comply with a mandatory standard. This mine has a history of methane gas and this pump installation is located approximately 60 feet from a sealed area.

The cited standard, 30 C.F.R. §75.507-1(a), provides that "[a]ll electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible except as provided in paragraphs (b) and (c) of this section." There is no contention that paragraphs (b) or (c) are applicable herein.

As previously noted, Excel admits the violations. It disputes only the "significant and substantial" (gravity) and unwarrantable failure (negligence) findings as well as the amount of proposed civil penalties. Dale Howell is an electrical inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) and had been working for MSHA since 2007. He had previously been a mine inspector for the State of Kentucky and has more than 30 years of coal mine industry experience. On May 11, 2009, Inspector Howell conducted an electrical inspection of the subject Van Lear Mine. As part of that inspection, he examined two de-watering pumps located near the mine's seals. The pumps were located in a low spot where water gathers. Howell explained that, without the pumps to remove built-up water from the area, the water could block the air current in the return air course and also impede travel through the area.

Howell testified that during an earlier visit to the mine that same week he found that the pumps had not been working and approximately three feet of water had built up in front of the seals. Only two feet of air space remained in the area and Howell explained that he was concerned that the ventilation would become blocked by the water. Excel's Assistant Chief Electrician Jake Bowen told Howell that the power had been off and the water had built up. Because of the amount of water in the area, Howell was unable to inspect the pumps. He told Bowen that he would return after the water was removed.

A de-watering pump consists of the pump itself, which sits on the mine floor usually in water, and a starter box, which is located 20-30 feet away in a dry location, usually suspended from the roof. The two are connected by an inner machine cable. Where the cable enters the starter box, it is insulated and secured by packing glands, which are filled with fiberglass-type rope.

Howell testified that when examining a de-watering pump, he checks for permissibility by using a feeler gauge and pulling on the cable entering the box to "see if it moves." If the cable moves, that indicates that the cable is not properly packed. According, to Howell, when a stuffing box is not properly packed, it is not permissible because, in the event of an explosion, the flames can escape the container by traveling past the unsecured cable.

When Howell returned to the mine on May 11th to inspect the P-40 and P-70 pumps located in front of the Number 8 seal, he found about a foot of water surrounding the area. Howell testified that he found that the packing glands were missing from both pump starter boxes and that there was a problem with the handle on one of the boxes. According to Howell, when he pulled on the cable to the starter box, it moved back and forth, and when he looked into the stuffing box, he did not see any stuffing. Howell opined that the cable to one of the boxes had been "whittled down with a knife so it would fit into the pump," and the stuffing boxes did not have proper lead ties to keep the packing glands from loosening.

Inspector Howell found that the condition of the pumps constituted a violation of 30 C.F.R. §75.507-1(a). He wrote Citation Number 8224945 based on the condition of the P-40 de-watering pump and he wrote Order Number 8224946 based on the condition of the P-70 pump. As previously noted these findings are not disputed.

The Secretary also maintains however that these violations were "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in injury and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Sec'y of Labor, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (Aug. 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *see also Halfway, Inc.,* 8 FMSHRC 8, 12 (Jan. 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this regard, Howell found that the condition of the pumps was likely to result in "[s]moke inhalation, or burns or even crushing injuries, concussion" to miners because of the proximity of the pumps to the seals, which in-gas and out-gas methane. According to Howell during periods of low barometric pressure, methane is liberated from the seals. Howell, explained that, because the starter box was not permissible, any spark would not be contained within the box and that it was likely that a spark from the box would be ignited by methane released from the nearby seals during a period of low pressure.

In this regard it is undisputed that the Van Lear Mine liberates 295,000 cubic feet of methane in a 24-hour period from one split of air. At the time of the citation, the mine was on a 15-day spot inspection for methane. Inspector Howell explained that, in addition to the seals, methane can escape from cracks in mine strata, particularly in areas where there has been a roof fall and that the mine had experienced a roof fall only one break inby the seals.

Howell credibly concluded that he would expect to see fatal injuries from a resulting methane explosion and injuries from burns or smoke inhalation from a mine fire. He further opined that 10 people would be affected by a methane explosion, and up to 50 or 60 people would be affected in the event of a disruption in the mine's ventilation system. Howell explained that up to 60 men travel to the bottom of the mine slope, which is 1500-2000 feet from the seals.

MSHA ventilation expert and supervisor, Craig Plumley, explained that he is familiar with the VL2 seals at Van Lear Mine and noted that behind the VL2 seals, are an initial set of seals. He testified however that there is no way to determine the current condition of the initial seals. Moreover, it is not disputed that before the installation of the current seals, an explosive mixture of methane was detected behind the seals. Mr. Plumley opined that considering the location of the non-permissible starter box in the return air course in a mine with this history of methane liberation there was a concern for an explosive hazard. Plumley further explained that, in addition to the location of the pumps in front of the VL2 seals, they were also in an area where four entries were compressed into one entry causing the air from five returns from active sections, which are also a source of methane, to move past the non-permissible pumps.

Plumley also confirmed Inspector Howell's opinion that the build-up of water around the pumps would put more pressure on the ventilation system behind the water build-up, which would reduce the airflow and allow a build-up of methane in front of the non-permissible starter boxes. In summation, Plumley stated as follows:

> In my opinion and my experience through mining history that I've been involved with, there is a high expectation of an explosive mix being generated outby seals that have been in an explosive range in the past and we have record of such that could liberate into the active workings over top of a non-permissible pump, two non-permissible pumps that would create a situation of an explosive atmosphere in conjunction with an ignition source. And the hazard, in my view, is the potential that this exposed the miners to an explosion throughout the mine that would cause fatal injuries.
>
> (Tr. 98)

Considering the credible testimony of these expert witnesses and the reasonable inferences therefrom, I conclude that the Secretary has met her burden of proving that the cited violations were "significant and substantial" and of high gravity. In reaching these conclusions, I have not disregarded Excel's arguments that, at the time the charging documents were issued, no methane was detected and that no deficiency in air volume or velocity was found at the site of the violative conditions In addition, I note Excel's argument that there has been no evidence of explosive methane ever found in the subject entry. Excel also notes that its ventilation has always been maintained with "a lot of air." I nevertheless note that continued mining operations must be considered in determining whether a violation is "significant and substantial" and I give persuasive weight to the existence of serious existing ignition sources in a mine liberating significant amounts of methane.

The Secretary also maintains that the admitted violations were the result the operator's unwarrantable failure and high negligence. Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991); *see also Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

In this regard, Inspector Howell found that the condition of the pumps resulted from high negligence on the part of the operator. After writing the citation, Howell spoke to electrician Jake Bowen, who said that he had worked at the mine for one month and, as far as he knew, the pumps had not been changed out in that time. The record books also did not indicate that the pumps had been changed in the week preceding Howell's inspection. Howell opined that this condition constituted an unwarrantable failure to comply with a mandatory safety standard because of the length of time the condition existed and the fact that "if you do an electrical exam, you can't miss these deficiencies." Howell explained that, as agents of the operator, the examiners should have known or did know of the cited conditions.

In addition to Mine Electrician Bowen's statement to Inspector Howell that the pumps had not been changed out in the month that he had worked at the Van Lear Mine, the mine's own records demonstrate that neither of the pumps was repaired between March 28, 2009 and May 11, 2009. This evidence is contrary to Chief Electrician Rick James' unsupported testimony that the pumps must have been changed sometime between the time of the last electrical examination and Howell's inspection. In addition, James acknowledged that "he didn't know that they [the pumps] had been changed or if anybody had changed them." I find however that the credible evidence supports the conclusion that no one had changed out the pumps in the weeks prior to the citation and order. The evidence also supports Howell's conclusion that the examiners were in a position to have seen these conditions for at least a month and failed to report those conditions or have taken the pumps out of service.

The violative conditions were also extensive. Neither pump located near the VL2 seals contained packing material. As Inspector Howell described, the citation was not due to an insufficient amount of packing material in the stuffing boxes; but rather, the complete absence of stuffing material in the boxes. The extent of the condition was obvious because, without any stuffing in the box, the cables moved back and forth freely. Inspector Howell credibly opined that the non-permissible condition of the pumps was obvious and could not have been overlooked during an electrical exam.

The evidence supports Inspector Howell's conclusion that the operator had knowledge of the violative conditions which, as previously noted, were of high gravity. Here, the operator's failure to correct the conditions is particularly egregious given that one of the starter boxes had a note written directly on top of its cover, which contained an expletive and referred to the functionality of the starter box. The note indicated that the breaker handle was not working properly and could not be reset from outside of the box. This note was sufficient to put the electrical examiner on notice that there was a problem with that pump. Moreover, a simple examination of the starter boxes, i.e. by pulling on the cable entering the boxes, would have clearly demonstrated to the examiner that the boxes contained no stuffing. Either the examiner failed to conduct that simple examination or conducted the examination but ignored the results. Either way, the operator is responsible for the intentional misconduct or gross negligence of the examiner. Under the circumstances, I find that the Secretary has met her burden of proving that the violations herein were the result of Excel's unwarrantable failure and high negligence.

In reaching these conclusions, I have not disregarded Excel's claim that the electrical examiners were not its agents so that their actions were not imputable to Excel. Clearly however, miners conducting permissibility examinations of electrical pumps are agents of the operator. *Rochester & Pittsburgh Coal Company,* 13. FMSHRC 189, 197 (February 1991). I further find that I can give but little weight to Mr. James' hearsay interviews with the examiners and electricians. Those miners could have suffered disciplinary action if they had admitted to working on the pumps, for failing to have conducted proper examinations or for failing to correct the violative conditions.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business.

The record shows that Excel is a medium to large size operator, has a significant history of violations and abated the violative conditions in good faith. There is no evidence that the penalties herein would affect the operator's ability to remain in business. The gravity and negligence criterion have previously been discussed.

Order

Citation No. 8224945 and Order No. 8224946 are hereby affirmed and Excel Mining, LLC is directed to pay civil penalties of $23,200.00 and $25,800.00 respectively for the violations charged therein within 40 days of the date of this decision.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
(202) 434-9977

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 27, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2009-244-M A.C. No. 04-00196-168887
v.	:	
LEHIGH SOUTHWEST CEMENT, Respondent	:	Mine: Tehachapi Plant

DECISION

Appearances: D. Scott Horn, Conference and Litigation Representative, U.S. Department of Labor, Vacaville, California, for Petitioner;

Brian Bigley, Safety Director, Lehigh Southwest Cement Company, Tehachapi, California, for Respondent

Before: Judge Paez

This case is before me upon the Petition of the Secretary of Labor for Assessment of Civil Penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act").[1] 30 U.S.C. § 815 (2008).

I. Statement of the Case

Respondent Lehigh Southwest Cement ("Lehigh") contests the sole citation at issue in this case, Citation No. 6440444, for which the Secretary seeks a civil penalty of $12,248, for failure to provide certain training under 30 C.F.R. § 46.5(a). The Secretary filed her Petition for Assessment of Civil Penalty on March 13, 2009, and this case was assigned to me on January 4, 2010. On July 30, 2010, Lehigh filed a Request for Hearing and Prehearing Statement pursuant to my Prehearing Order. I held a conference call with the parties on September 29, 2010, to set this case for trial and issued a Notice of Hearing on October 25, 2010. The hearing in this matter took place on November 22, 2010, in Woodland Hills, California, where I admitted the parties' documentary evidence, as well as the testimony of MSHA Inspector David Reynolds and Lehigh

[1] References to Exhibit A of the Secretary's Petition for Assessment of Civil Penalty, Lehigh's exhibits, and the Secretary's exhibits are abbreviated as "Sec'y Ex. A," "Ex. D-#," and "Ex. P-#," respectively. References to Lehigh's Written Closing Arguments, the Petitioner's Post-Hearing Brief, and Lehigh's Post Closing Response are abbreviated as "Resp't Br.," "Sec'y Br.," and "Resp't Resp.," respectively.

Safety Manager Brian Bigley. Lehigh filed its post-hearing brief on December 1, 2010. The Secretary filed her brief on March 8, 2011, pursuant to my Order granting the Secretary's request for a longer briefing schedule. Lehigh filed its response on March 30, 2011.

II. Stipulations

The parties agree to the following facts:

a. The Administrative Law Judge and Federal Mine Safety and Health Review Commission have jurisdiction over this proceeding.

b. Tehachapi Plant is a mine and is subject to the Federal Mine Safety and Health Act of 1977.

c. At all times relevant to these proceedings, Lehigh Southwest Cement Company operated the Tehachapi Plant.

d. David Reynolds was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued citation number 6440444 and that said citation was served upon the [R]espondent.

e. The violation was promptly abated.

f. Payment of the proposed penalty will not affect the Respondent's ability to continue in business.

g. The Respondent's mine size and the employment hours documented in Exhibit A of the Petition for Assessment[] are correct.

h. The Respondent's history of violations as documented in Exhibit A of the Petition for Assessment is correct.

(Sec'y Prehr'g Report 1–2. *See* Resp't Prehr'g Report 1–2 (restating stipulated facts).)

III. Issues

The Secretary argues that Lehigh violated 30 C.F.R. § 46.5(a) by failing to ensure that the construction workers rebuilding its mine's fuel station were provided new miner training. (Sec'y Br. 3–4.) The Secretary further contends that Lehigh's alleged violation was significant and substantial ("S&S"),[2] as the improperly trained miners were exposed to significant mine

[2] The S&S terminology derives from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and (continued...)

hazards. (*Id.* at 9–10.) The Secretary asserts that Lehigh's negligence was high because its safety manager knew the safety regulations yet allowed the contract construction workers to work at the mine without proper training. (*Id.* at 10–11.)

Lehigh asserts that no violation occurred because these workers were not "miners," thus not requiring new miner training. (Resp't Br. 1–6; Resp't Resp. 1–8.) Alternatively, Lehigh contends that the Secretary may not designate this alleged violation as S&S because it is not a mandatory safety standard. (Resp't Br. 6–7; Resp't Resp. 8.) Even if the S&S designation is applicable, Lehigh urges that the facts do not support that determination or the Secretary's contention of high negligence. (Resp't Br. 6–7; Resp't Resp. 8–9.)

Accordingly, the issues before me are as follows: (1) Whether the Secretary has established a violation of 30 C.F.R. § 46.5(a) by proving the workers constructing the new fueling station at Lehigh's mine were "miners" under 30 C.F.R. § 46.2(g), thus requiring new miner training; (2) whether the record supports the gravity of the alleged violation; (3) whether the alleged violation was S&S; (4) whether the record supports Lehigh's negligence with respect to the alleged violation; and (5) whether the proposed penalty is appropriate under section 110(i) of the Mine Act.

For the reasons that follow, Citation No. 6440444 is affirmed.

IV. Background and Findings of Fact

A. Tehachapi Plant Mine Operation

Lehigh operates the Tehachapi Plant in Kern, California, which produces Portland cement. (Tr. 13:13–15; Sec'y Ex. A.) The mine runs twenty-four hours a day with most workers there between 7 a.m. and 3:30 p.m. (Tr. 79:7–18.) In 2008, Lehigh contracted with Valued Engineering to develop a new fuel station for its mine. (Tr. 24:5–6, 53:8–16.) The project involved the installation of aboveground fuel tanks to hold the gasoline and diesel used by the mine's vehicles, as well as the removal of the station's old underground fuel tanks. (Tr. 51:12–19, 53:4–16.) Although Valued Engineering was responsible for the entire project, it subcontracted with several other companies to carry out the project's different phases. (Tr. 53:17–54:17.) Bagley Enterprises performed much of the project's "backhoe work," such as placing the concrete pads for the new fuel tanks and digging up the old tanks. (*Id.*) Valued Engineering used other specialty companies to complete the remaining portions of the project, such as installing new electrical fixtures. (*Id.*)

The fuel station remained open throughout the duration of the construction project. (Tr. 77:17–22.) Lehigh used the underground fuel tanks until the new aboveground ones were ready. (*Id.*) To minimize any disruption to the project, Lehigh required its vehicles to refuel after-hours

(...continued)
substantially contribute to the cause and effect of a . . . mine safety or health hazard."

between 6 p.m. and 6 a.m. to avoid being at the fuel station while the construction workers were there. (Tr. 51:20–53:3, 79:19–21.) Additionally, Lehigh kept a fully loaded fuel truck away from the fuel station for emergencies. (Tr. 52:21–22.)

The fuel station is located on an access road adjacent to the main mine road and entrance gate, which lie just north of the station. (Tr. 42:14–17, 83:15–22; Ex. D-1.) The mine employee parking lot is directly to the east of the fueling station and is separated from the station by a chain-link fence. (Tr. 48:21–49:6; Ex. D-1.) A large warehouse, known as the "Seymour Building," lies further south along the fuel station access road, adjacent to the southwest corner of the fueling station. (Tr. 42:14–20, 48:2–3; Ex. D-1.) The Seymour Building houses the mine's mobile-mechanic shop at its east end, which is the side closest to the fueling station. (Tr. 48:11–17.) The Seymour Building also contains welding operations, administrative offices, break rooms, bathrooms for the millwrights, and a parts disbursal area. (*Id.*) Additionally, Lehigh uses an area adjacent to the northeast corner of the Seymour Building to power-wash its vehicles. (Tr. 42:6–7, 69:11–18; Exs. D-1, D-10.) An asphalt road encircles the Seymour Building and provides an additional connection to the main mine road at the northwest corner of the building. (Ex. D-1.)

B. MSHA's Inspection

Over a two-week period in August 2008, MSHA Inspector David Reynolds conducted a regular inspection of the Tehachapi Plant. (Tr. 14:13–22.) During that time, Reynolds observed approximately six workers performing various construction tasks at the fuel station construction site. (Tr. 13:20–24.) On the day Reynolds issued his citation, the workers were pouring concrete. (Tr. 13:20–24, 34:23–35:2.) Reynolds did not observe any experienced miners in the area and inspected Valued Engineering's training records. (Tr. 14:3–5.) Through this inspection, as well as by speaking with Valued Engineering's supervisor, Reynolds discovered that the workers at the site had received only site-specific training in July 2008. (Tr. 14:3–9, 15:7–14.) Valued Engineering's supervisor further advised that they had been at the project site for approximately three months. (Tr. 37:13–17.) Inspector Reynolds also spoke with Lehigh Safety Manager Brian Bigley. Bigley advised that he had provided site-specific training to the workers but that he had determined that comprehensive training was unnecessary. (Tr. 15:15–20, 21:19–22:4.) At the hearing, Bigley confirmed that he provided everyone who worked at the site with site-specific training when they came to start work on the project (Tr. 56:5–9) but not comprehensive training because he did believe that the workers met the regulatory definition of a "miner" (Tr. 58:6–60:21).

Based on his determination that the workers at the fuel station had not received adequate training, Inspector Reynolds issued a withdrawal order under section 104(g)(1) of the Mine Act requiring the workers to leave the job site. (Ex. P-1.) Additionally, Reynolds issued the citation at issue in this matter, No. 6440444, charging a violation of 30 C.F.R. § 46.5(a) for failing to provide comprehensive new miner training to the workers. (Tr. 16:16–17:9.)

The citation narrative states the following:

> The Company was aware that the contractor, Valued Engineering, did not have their Part 46 training as required, and allowed them to work at the mine site. The Company gave the contractor site specific hazard training, when they started work in July, 2008. This condition creates a hazard to the contractor, and to others.

(Ex. P-1.)

Based on the workers' close proximity to large mobile equipment in use at the mine site, particularly at the nearby Seymour Building's mobile equipment shop, Reynolds determined that the alleged violation created a reasonably likely risk of fatal injury to one miner. (Tr. 17:12–20:18.) Reynolds determined that such equipment could fatally crush an improperly trained miner. (Tr. 19:14–17.) In addition to hazards associated with the mobile equipment in use at the mine, Inspector Reynolds also asserted that the construction workers were exposed to electrical hazards through their work at the fuel station project. (Tr. 38:18–21.) Noting that this alleged violation involved the reasonable likelihood of fatal injury, Reynolds charged it as S&S. (Tr. 20:2–8.)

V. Principles of Law

A. Regulatory Interpretation

The Commission has prescribed the following guidance for interpreting the Secretary's regulations:

> Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1990); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is of 'controlling wight unless it is plainly erroneous or inconsistent with the regulation.'") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted).

Lodestar Energy, Inc., 24 FMSHRC 689, 692 (July 2002).

The statutory provision underlying the regulation, as well as any related statements accompanying the regulation's publication in the *Federal Register*, may illuminate the regulation's meaning. *Lodestar Energy*, 24 FMSHRC at 693. An individual provision of the Secretary's regulations should comport with the other sections of the regulations so as "to effectuate the Mine Act's goal of promoting the safety and health of miners." *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (citing *Emery Mining*, 744 F.2d at 1414).

B. Significant and Substantial

An S&S violation is one "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove the four elements of the *Mathies* test:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted). *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

VI. Further Findings of Fact, Analysis, and Conclusions of Law

A. Fact of Violation

1. Regulatory Analysis

Here, the Secretary alleges that Lehigh failed to provide new miner training to the fuel station workers in accordance with the following regulatory provision:

> Except as provided in paragraphs (f) and (g) of this section, you must provide each *new miner* with no less than 24 hours of training as prescribed by paragraphs (b), (c), and (d). Miners who have not yet received the full 24 hours of new miner training must work where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner.

30 C.F.R. § 46.5(a) (emphasis added).

A *new miner* is "a person who is beginning employment as a miner with a production-operator or independent contractor and *who is not an experienced miner*." 30 C.F.R. § 46.2(i) (emphasis added). For the purposes of this case, Lehigh does not assert that the construction workers referenced by the citation were experienced miners, thereby not requiring new miner training. Rather, Lehigh asserts that the workers were not "miners" at all. Accordingly, the determination of a violation in this case hinges on whether the workers were miners.

A miner is:

> (1)(i) Any person, including any operator or supervisor, who works at a mine and who is engaged in *mining operations*. This definition includes independent contractors and employees of independent contractors who are engaged in *mining operations*; and
> (ii) Any construction worker who is exposed to hazards of *mining operations*.
> (2) The definition of "miner" does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. This definition also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods.

30 C.F.R. § 46.2(g) (emphasis added).

A person's status as a miner turns on whether he or she is engaged in, or exposed to the hazards of, "mining operations." For the purposes of the Secretary's training regulations, mining operations involve "mine development, drilling, blasting, extraction, milling, crushing, screening, or sizing of minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." 30 C.F.R. § 46.2(h).

Here, the evidence establishes that the workers cited by Reynolds were involved in building the Tehachapi Plant's new fuel station, making them "construction workers" under any definition of the term.[3] The question, then, is whether they were "exposed to hazards of mining operations." The word "exposed" is ambiguous, as it raises questions about the degree and duration of contact with mining operation hazards necessary to fall under the ambit of the regulatory provision.

The Secretary defines which construction workers may be considered "miners" as follows:

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[3] As the fuel station workers fall under the category of "construction workers," I need not consider Lehigh's objections to classifying the workers as independent contractors and employees of independent contractors who are engaged in mining operations under 30 C.F.R. § 46.2(g)(1)(i). (Resp't Br. 2; Resp't Resp. 3–4.)

> [C]onstruction workers, because of the nature of their work, are not typically engaged in mining operations . . . . However, construction workers who are at an active mine site will be exposed to significant hazards of mining. Construction workers are also typically at the mine site for extended periods because of the nature of their work, unlike many other employees of independent contractors. For these reasons, the final rule now provides that construction workers who are exposed to hazards of mining operations are considered "miners" under the final rule. *This means that construction workers who work in an active mine site are considered "miners" and must receive comprehensive training (i.e., new miner training or newly hired experienced miner training, as appropriate).* Construction workers who are not "miners" must receive site-specific hazard awareness training under § 46.11(b).

Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines, 64 Fed. Reg. 53,080, 53,095 (Sept. 30, 1999) (emphasis added).

Thus, according to the Secretary, any construction worker who works at an active mine site is a "miner." Construction workers at an inactive mine site may not necessarily be classified as "miners." As noted by the Secretary, this definition reflects the fact that construction workers typically work at a mine site for an extended period of time and are typically exposed to hazards of mining. Indeed, construction workers at an active mine site work in the general environment as workers engaged in mining operations and thus are exposed to the same set of hazards. The Secretary's regulation ensures that all of these workers receive the same comprehensive safety training, effectuating the Mine Act's purpose of protecting miners. Importantly, the Secretary's interpretation also unambiguously notifies mine operators of their obligations toward training construction workers. I conclude that the Secretary's interpretation of the scope of her regulation is reasonable.

2. Application of Regulation to Facts

The evidence demonstrates that Lehigh allowed its contractor's workers to be at the fuel station without having received comprehensive miner training. Inspector Reynolds discovered that Lehigh provided only site-specific training in July 2008, and Lehigh Safety Director Bigley confirmed that he provided only site-specific training to the workers upon commencement of the project prior to Reynolds's inspection. Additionally, the regulation does permit miners who have not completed their new miner training to work where an experienced miner can observe the new miner performing work in a safe and healthful manner. 30 C.F.R. § 46.5(a). Here, however, Inspector Reynolds presented uncontroverted testimony that no experienced miner was present while the workers were at the mine site.

Most importantly, the Tehachapi Plant is an active mine operation that runs twenty-four hours per day, thus requiring these construction workers to have new miner training. The

evidence bears out the conclusion that the workers at the fuel station project were exposed to the hazards of mining operations. Several types of vehicles specific to Lehigh's operation operated at Tehachapi Plant in the vicinity of the fuel station project. Lehigh used a small dual-axle water truck, as well as an eighty-five-ton haulage truck that had been converted into a water truck. (Tr. 18:5–9.) The mine used eighty-five-ton trucks for haulage, too, as well as bulldozers, loaders, street sweepers, and service trucks. (Tr. 18:10–19:4.) Not only was the construction site located at the mine's only fuel station, it also was near the Seymour Building's mobile-mechanic shop and power-washer area, two other major destinations for these vehicles. (Tr. 17:23–18:2, 42:5–7.) Indeed, at the time of the alleged violation, Reynolds observed a water truck, loader, and street sweeper on the road heading to, and around by, the maintenance shop in the same vicinity of the fuel station project. (Tr. 25:20–26:3.) These vehicles traveled near the construction site in connection with the haulage and maintenance of mine equipment, two examples of the types of activities qualifying as "mining operations" under 30 C.F.R. § 46.2(h).[4] Inspector Reynolds accurately characterized these hazards as mining hazards. (Tr. 43:11–13.)

In addition to hazards posed by mine vehicles, the kiln and tower, associated with the Tehachapi Plant's concrete processing activities, were located west-southwest from the fuel station off of the main mine road. (Tr. 56:22–24, 57:12–25, 71:10–22; Exs. D-1, D-6.) Lehigh Safety Director Bigley acknowledged that these areas could be hazardous and covered them in Lehigh's site-specific training regimen. (Tr. 56:10–24.) Although these buildings were located farther from the mine site than the Seymour Building and Lehigh instructed the fuel station workers not to go there, they were still not physically closed off to the workers. (Tr. 56:22–57:3.) Indeed, Bigley acknowledged that at the plant it is "easy . . . to find yourself in a spot you may not be familiar with." (Tr. 57:2–3.)

Nevertheless, Lehigh contends that the workers at the fuel station project were not exposed to the hazards of its mining operation. (Resp't Br. 5–6; Resp't Resp. 6–7.) In addition to presenting uncontroverted testimony that it had directed its vehicles not to travel by the fuel station during daytime hours while the construction workers were at the site, Lehigh presented evidence that it had erected a temporary seven-foot fence around three sides of the fuel station. (Tr. 48:21–49:4.) The fence separating the employee parking lot from the fuel station bound the eastern side of the fuel station site. (Tr. 49:5–6.) Another side of the fence ran on the south side of the site from the employee parking lot to across the access road. (Tr. 49:7–9.) The third side of the fence ran across the north side of the fuel station to prevent vehicles on the main road from entering the site. (Tr. 49:20–23.) The western side of the fuel station was not fenced, and it opened up to a large flat area through which the workers could access the Seymour Building, the main mine road, as well as the rest of the Tehachapi Plant. (Tr. 72:16–18; Ex. D-1.)

[4] In addition to vehicles traveling around the Seymour Building, loaders traveling between the mine's limestone dome, which contains material used in cement-making, and the maintenance shop could travel by the fuel station. (Tr. 41:6–8, 42:18–43:1, 61:14–25.) Lehigh, however, had directed traffic away from the access road on the east side of the limestone to prevent vehicles from traveling past the fuel station on the main mine road. (Tr. 61:14–25.)

Additionally, Lehigh told the workers not to go outside of the work site. (Tr. 56:24–25.) Lehigh provided portable outdoor toilets and sun canopies at the site to encourage workers not to go into the Seymour Building. (Tr. 49:13–16.) At the hearing, Lehigh Safety Manager Bigley suggested that the workers could go to their cars for breaks. (Tr. 50:20–21.) According to Lehigh, these measures isolated the fuel station workers from the mine hazards present at the Tehachapi Plant. (Resp't Br. 5–6; Resp't Resp. 6–7.)

Nonetheless, the fence was easily penetrable. The workers had a key to the fence to allow their work vehicles into the site. (Tr. 49:24–50:1.) Indeed, Inspector Reynolds observed that the workers had their own vehicles, as well as their own cement trucks, in the area. (Tr. 44:21–45:2.) Moreover, workers could easily walk through the grassy area next to the open side of the work site and access the rest of the mine. (Ex. D-1.) The fence's permeability most likely underlies Inspector Reynolds's lack of recollection of any other fence besides the mine's main gate and the fence at the employee parking lot (Tr. 82:21–83:22), not a lack of credibility as Lehigh contends (Resp't Resp. 7). Finally, the fuel station's construction took place during the summer months at a mine sited in a barren, southern California desert. (Exs. D-1–D-14.) I do not find that Lehigh's provision of portable toilets and sun canopies, as well as its reliance on the workers' ability to access their personal vehicles, sufficient to give the workers no "reason whatsoever" to access the Seymour Building's break areas for shade, cool water, or first aid. (Tr. 50:19–20.) The application of a safety standard involving a miner's behavior should account for the "vagaries of human conduct" and "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In light of these considerations, I conclude that the workers at the fuel station were exposed to mine hazards at the Tehachapi Plant. *See Oil-Dri Prod. Co.*, 32 FMSHRC 1761, 1771–75 (Nov. 2010) (ALJ) (concluding that construction workers installing siding on building at mine site were exposed to mine hazards of mine operations and required 30 C.F.R. part 46 ("part 46") new miner training).

Notwithstanding these considerations, Lehigh asserts that the Secretary has not met her burden of proof in demonstrating a violation in this case. (Resp't Br. 5–6; Resp't Resp. 6.) Specifically, Lehigh points to Safety Director Bigley's testimony that work at the fuel station was performed by many different groups of workers who were present at the site only a few days at a time. (Tr. 59:3–5; Resp't Br. 5–6; Resp't Resp. 6.) According to Bigley, the workers present when Inspector Reynolds issued the citation were scheduled to be at the work site for three days. (Tr. 55:3–7.) Furthermore, Inspector Reynolds could not determine whether the workers he observed during his two-week inspection were the same ones he saw when he inspected the fuel station. (Tr. 27:6–21.) Lehigh concludes that the workers were not exposed to mine hazards or present at the mine site long enough for them to be miners under the regulations. (Resp't Br. 5–6; Resp't Resp. 6.)

In spite of Lehigh's suggestions to the contrary, the regulatory language does not require construction workers to be present at an active mine site for a minimum number of days to be adequately exposed to mine hazards and considered "miners." The Secretary has plainly stated

that construction workers at an active work site are considered "miners," and they require new miner training. *See* discussion *supra* Part VI.A.1.

Moreover, Bigley's own testimony undermines the credibility of his assertion that these workers were present at the site for only a few days at a time. Bigley trained the fuel station workers in July 2008, several weeks before the citation's issuance in August. Different subcontractors undoubtedly carried out various aspects of the project, but the bulk of the work at the site, and that observed by Reynolds when he issued the citation in this case, was the backhoe work of removing the old fuel tanks and installing the new ones. Valued Engineering used one subcontractor for this work—Bagley Enterprises. To abate the violation, Bigley worked with Valued Engineering and Bagley Enterprises to develop a new miner training program. (Tr. 55:21–56:4.)

In a similar effort to confuse the issue, Lehigh asserts that "the concept of 'frequent or extended periods' of work" supports its proposition that the fuel site workers were not miners.[5] (Resp't Br. 3–4; Resp't Resp. 4.) Here, Lehigh relies on the regulatory provision exempting certain categories of workers as miners: "The definition of 'miner' does not include scientific workers; delivery workers; customers (including commercial over-the-road truck drivers); vendors; or visitors. *This definition also does not include maintenance or service workers who do not work at a mine site for frequent or extended periods*." 30 C.F.R. § 46.2(g)(2) (emphasis added). Lehigh also points to the regulatory provision listing the categories of workers who require site-specific training:

> You must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at a mine site; including:
>
> (1) Office or staff personnel;
> (2) Scientific workers;
> (3) Delivery workers;
> (4) Customers, including commercial over-the-road truck drivers;

[5] Lehigh's reference to circuit court precedent in support of a "nature of the work" test for miner status is unavailing. (Resp't Br. 4; Resp't Resp. 5.) The Fourth Circuit's decision in *Old Dominion Power Co. v. Donovan* and the Seventh Circuit's decision in *Northern Illinois Steel Supply Co. v. Secretary of Labor* dealt with whether a particular company was subject to the Mine Act's jurisdiction, not whether a worker was a "miner." *Old Dominion*, 772 F.2d 92, 93 (4th Cir. 1985); *Northern Illinois Steel*, 294 F.3d 844, 849 (7th Cir. 2002). *National Industrial Sand Ass'n v. Marshall* concerned a challenge to the promulgation of the Secretary's training regulations at 30 C.F.R. part 48, not the part 46 regulations at issue in this case. 601 F.2d 689, 694 n.2 (3d Cir. 1979). Moreover, the section of *National Industrial Sand* cited by Lehigh deals with the definition of an "operator." *Id.* at 701. Indeed, in *National Industrial Sand*, the court concluded that the Secretary's part 48 definition of a "miner" was valid. *Id.* at 707. The correct guidance for the definition of a miner in this case is the regulatory language and related cases, not precedent concerning separate issues.

(5) Construction workers or employees of independent contractors who are not miners under § 46.2 of this part;

(6) *Maintenance or service workers who do not work at the mine for frequent or extended periods*; and

(7) Vendors or visitors.

30 C.F.R. § 46.11(b) (emphasis added).

A plain reading of these sections demonstrates that Lehigh's arguments are meritless. Here, the phrase "frequent or extended periods" is used to distinguish which maintenance or service workers must receive comprehensive training or site-specific training; thus, maintenance or service workers who work at a mine for frequent or extended periods of time must receive comprehensive training. 30 C.F.R. §§ 46.2(g), 46.2(i), 46.5(a), 46.11(b). The phrase "frequent or extended period" does not appear by any other classification of worker under the Secretary's training regulations. Although a construction worker must be exposed to hazards of mine operations to be a "miner," the lodestar of this analysis is whether the worker is at an active mine site, not whether he or she is at the mine for "frequent or extended periods."

The Secretary's interpretation serves the purposes of the Mine Act. By the nature of their position at a mine, construction workers typically work for longer periods of time and are exposed to a greater variety of mine hazards, as opposed to maintenance or service workers, such as delivery people or truck repairmen, whose contact with the mine is inherently transient and serves much narrower purposes. As illustrated in this case, although some of the workers may have been at the mine for only a few days at a time as Lehigh contends, a fatal mine accident involving a partially-trained miner engaged in construction can occur at a moment's notice.

Based on the foregoing, I determine that the fuel station construction workers were "miners."[6] Because these workers did not receive new miner training, were not "experienced miners," and were not working in view of an experienced miner, I conclude that Lehigh violated 30 C.F.R. § 46.5(a).

[6] I reach this conclusion notwithstanding Lehigh's position that the doctrine of unclean hands prevents classification of these workers as miners. According to Lehigh, because the Secretary does not classify her inspectors as miners, it follows that she is in violation of her own interpretation of the regulations may not prevail in this case. (Resp't Resp. 3.) As a general matter, the doctrine of unclean hands is used to defend against a request for equitable relief, i.e., an injunction, "when the plaintiff's improper conduct is directed at the defendant and relates to the subject matter of the action." 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2946 (2d ed. 2011). As this case concerns neither a request for equitable relief nor the application of the Secretary's training regulations to her inspectors, Lehigh's contentions are meritless.

B. Gravity and S&S

1. Gravity

The Secretary asserts that Lehigh's violation created the reasonably likely risk of fatal injuries and charged it as S&S. In support of her argument, the Secretary relies on the fuel station workers' proximity to the heavy mobile equipment in use at the Tehachapi Plant. (Sec'y Br. 9–10.) According to the Secretary, an untrained miner could experience a fatal crushing injury caused by one of these vehicles, a concern underscored by the recent death of a miner who was hit by a truck at the Tehachapi Plant. (*Id.* at 10.) In addition to these hazards, further evidence included the possibility of electrical hazards at the fuel station, as well as hazards posed by the Tehachapi Plant's kiln and tower.

The purpose of comprehensive miner training is to educate miners about the panoply of risks posed by working at a mine site, including mobile equipment hazards. *See* 30 C.F.R. § 46.5(b) (setting forth the requirements of new miner training). A partially-trained miner could easily find himself or herself in a dangerous situation involving a mine vehicle and suffer fatal injuries. Indeed, the Mine Act requires that if an inspector discovers a miner who has not received the safety training directed by the Act, the inspector must issue an order "declaring such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the mine . . . until such miner has received the training required by . . . [the] Act." 30 U.S.C. 814(g)(1).

At the hearing, Lehigh Safety Manager Bigley acknowledged that the Tehachapi Plant had various, significant hazards and conveyed that information to the fuel station workers during their site-specific training:

> We talk about the kiln and how hazardous that is and special procedures for entering the kiln and tower area. Although these guys were banned from all those areas, we still talked about them so they get a sense of . . . the uniqueness of a cement plant and how easy it is to find yourself in a spot you may not be familiar with . . . . [W]e had kind of impressed on them "Don't go anywhere else because it's a big cement plant, and things could happen. So stay here in your area and don't wander off."

(Tr. 56:22–57:11.)

Besides this information, Bigley's training covered first aid procedures, evacuation plans, and reporting emergencies and hazards (Tr. 56:10–20, 76:9–22.) At the same time, Bigley revealed that a substantial basis underlying his conclusion not to offer new miner training to the workers stemmed from his assumption that they had related experience in construction, exposing them to large vehicles, as well as a provision in Lehigh's contract with Valued Engineering stating that the workers had all required training. (Tr. 59:21–60:11, 78:6–14.) Altogether,

Bigley's testimony reveals that Lehigh provided a superficial introduction to the Tehachapi Plant's hazards, at best.

As I concluded above, the fuel station workers were exposed to the Tehachapi Plant's mine hazards, particularly mobile equipment moving about the mine site. The fuel station workers were located adjacent to the Seymour Building, closest to the side where Lehigh repaired and power-washed its mobile equipment. Although this equipment may not have driven through the fuel station while the workers were there, it certainly operated proximate to the fuel station, as evidenced by Inspector Reynolds's observations of such vehicles during his inspection. Moreover, the Secretary presented uncontested evidence that a person recently died after being struck by a truck at the Tehachapi Plant, underscoring the real possibility of a severe accident. (Tr. 19:22–20:1.) The Mine Act presumes that an improperly trained miner is a hazard to himself and others, and these workers required new miner training to educate them about avoiding the risks at the plant.[7] Lehigh's efforts to "kind of impress on" these workers about the dangers at the plant were inadequate, and assuming continued mining operations, I conclude that Lehigh's violation was associated with a reasonably likely risk of fatal injuries to one miner.

2. S&S

As for whether this violation was S&S, Lehigh disputes the Secretary's legal authority to cite any violation of 30 C.F.R. § 46.5(a) as S&S based on the Administrative Law Judge's decision in *Carmeuse Lime and Stone, Inc.*, 29 FMSHRC 815 (Sept. 2007) (ALJ). (Resp't Br. 6–7; Resp't Resp. 8–9.) In *Carmeuse Lime and Stone*, the Administrative Law Judge determined that a training violation of a regulation under 30 C.F.R. part 48 could not be S&S because it was not a mandatory training standard, thus failing the first element of *Mathies*. 29 FMSHRC at 820–21.

The Mine Act "does not authorize [the Secretary] to designate as 'significant and substantial' a violation of a regulation . . . that is not a mandatory health or safety standard." *Cyprus Emerald Res. Corp. v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). To be a mandatory health or safety standard, it must be issued pursuant to section 101 of the Mine Act, which sets forth the procedures for promulgating mandatory health and safety standards. *Id.* at 43 n.2 (citing 30 U.S.C. § 811). Here, the part 46 training regulations were indeed issued under section

[7] Contrary to Lehigh's assertions otherwise, its violation of 30 C.F.R. § 46.5(a) stems from the failure to provide proper training and the attendant risks to the partially trained workers, not from "a lack of paperwork." (Resp't Br. 7; Resp't Resp. 8.) Additionally, Lehigh's contention that Inspector Reynolds erred by forbidding the workers to work at the Tehachapi Plant until they received new miner training, rather than forbidding them from working at any mine until they were trained, is a non sequitur. (Resp't Resp. 9.) The Mine Act gave Inspector Reynolds the authority only to send the workers away from where he discovered the violation, the Tehachapi Plant. Finally, as stated *supra* note 7, Lehigh's reliance on the doctrine of unclean hands in support of reducing this violation's gravity and negligence is irrelevant to this proceeding. (*Id.*)

101 of the Mine Act. Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines, 64 Fed. Reg. at 53,130. Therefore, the part 46 training regulations are mandatory safety standards. I conclude that the Secretary is correct in her assertions that this violation may be designated as S&S. (Sec'y Br. 4–9.)

Applying the four elements of the *Mathies* test for S&S, I conclude that the Secretary has established the first element by demonstrating the violation of a mandatory safety standard. Lehigh's failure to provide new miner training created the hazard of a partially-trained miner, who, as recognized by the Mine Act and shown by the facts of this case, is a danger to himself and others, thus establishing the second element of *Mathies*. Finally, the violation created the reasonably likely risk of fatal injury, satisfying the final two elements of *Mathies*. Accordingly, I conclude that this violation was S&S.

C. Negligence

The Secretary argues that because Lehigh Safety Director Bigley had a background in mine safety and training and because he knew that the workers at the fuel station did not have new miner training, Lehigh's negligence was "high." (Sec'y Br. 10–11.) As stated above, Bigley admitted that he did not provide new miner training to the workers at the fuel station site. As for Bigley's qualifications, the following exchange took place concerning Bigley's familiarity with the Secretary's safety training regulations:

> Q. And your experience with the Part 46 training, and providing training, and things of that nature, could you describe that in general terms, please[?]
> A. Apparently, I was doing Part 46 training before there was a Part 46. Back in [sic] early '90s, I obtained a part 48 training card for surface mines.
> And even when I wasn't in the mining industry, I still occasionally worked as a freelance contractor teaching occasional mine safety classes in either the Midwest or in Arizona for folks who were going to be going on mine properties who needed a refresher or additional training.
> *Q. Suffice it to say, you feel very comfortable in the requirements of Part 46; would that be true?*
> *A. I believe so, yes.*

(Tr. 46:25–47:14 (emphasis added).) Additionally, Bigley authored Lehigh's post-trial brief and response, which are replete with legal citations purporting to support Lehigh's position on the Secretary's training regulations. Based on the record before me, I conclude that Lehigh's negligence should be measured against the standard of care of a safety expert specializing in the Secretary's training regulations.

Here, Lehigh provided site-specific training to the construction workers, which covers many of the same subjects, albeit in less detail, as new miner training. *Compare* 30 C.F.R.

§ 46.5(b) (setting forth requirements of new miner training) *with* § 46.11(d) (setting forth requirements of site-specific training). Lehigh also took some measures to reduce, though not eliminate, the workers' exposure to mine hazards. Nevertheless, as noted above, the Secretary clearly stated her position concerning a construction worker's status as a miner when he or she is present at an active mine site, such as a Lehigh's. A safety expert specializing in the Secretary's training regulations, particularly one familiar with legal authorities such as the *Federal Register*, would have been familiar with the Secretary's position on a construction worker's status as a miner and complied accordingly. Therefore, I affirm the Secretary's determination that Lehigh engaged in high negligence in committing this violation.

D. Civil Penalty

Under section 110(i) of the Mine Act, the Administrative Law Judge must consider six criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of the penalty relative to the size of the operator's business, the operator's negligence, the penalty's effect on the operator's ability to continue in business, the violation's gravity, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The parties stipulated that Lehigh promptly abated its violation, and the evidence shows that Lehigh's demonstrated good faith in attempting to achieve rapid compliance after receiving the Secretary's citation. Additionally, the parties stipulated that the proposed penalty assessment of $12,248 would not affect Lehigh's ability to remain in business. They have also stipulated that Lehigh's history of violations, as shown in Exhibit A, is correct. Exhibit A, however, reveals only the number of history points associated with this violation. I note the Secretary did not provide the Assessed Violation History Report detailing the specific violations underlying the effect of Lehigh's history of violations on her proposed penalty assessment under 30 C.F.R. part 100. Nevertheless, based on the parties' stipulation, Lehigh's history of violations is reflected in my penalty determination. Finally, I have determined that Lehigh engaged in high negligence in committing an S&S violation that created the reasonably likely risk of fatal injury to one miner. Based on all of these considerations, I conclude that the Secretary's proposed penalty of $12,248 is appropriate.

VII. Order

In light of the foregoing, Citation No. 6440444 is hereby **AFFIRMED**. Lehigh is **ORDERED** to pay a civil penalty of $12,248 within 40 days of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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December 30, 2011

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA),	:	CIVIL PENALTY PROCEEDINGS
Petitioner	:	Docket No. KENT 2009-444
	:	A.C. No. 15-18911-170135-01
v.	:	
	:	Docket No. KENT 2009-445
	:	A.C. No. 15-18911-170135-02
CAM MINING, LLC	:	
Respondent	:	Docket No. KENT 2009-446
	:	A.C. No. 15-18911-170135-03

DECISION ON REMAND

Background

These cases are before me under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (2006) ("the Act"). On September 21, 2011, the undersigned judge issued a summary decision based upon facts presented by the Respondent and undisputed by the Secretary of Labor ("Secretary") finding that the Secretary had shown no factually supported reason (adequate cause) as to why her petitions for assessment of civil penalties were not timely filed and dismissing the petitions. As stated in that decision, CAM Mining, LLC ("CAM") had filed, on August 26, 2011, a motion for summary decision based on the Secretary's failure to establish adequate cause for her late filing of the petitions at issue. It was also noted therein that the Secretary had not responded to the motion and that the Respondent's proffered statement of facts was therefore accepted as undisputed[1]. Applying Commission Rule 67(b) and constrained by Commission precedent and by the undisputed facts presented, the motion was granted. One of the effects of the summary decision however was to modify a prior order of another judge in the case which had been issued on the now undisputed misrepresentation of facts set forth in an affidavit submitted by the Secretary's representative.

[1] In an unrelated telephone conversation several weeks after the motion for summary decision was filed, counsel for the Secretary inquired as to when this judge would be ruling on that motion. The undersigned responded that he had been waiting for a response from the Secretary. Having thereby been given additional notice of the need to respond, the Secretary, inexplicably, still failed to respond or otherwise correct her misrepresentation and the summary decision was thereupon issued. The Secretary now alleges that the undersigned abused his discretion in issuing that decision. It is noted that the Secretary's underlying position has been that she does not need to demonstrate "adequate cause" (See Secretary's Motion For Leave to File Out of Time p.3).

In her petition for review before the Commission, the Secretary did not challenge the summary decision on its merits and acknowledges that a prior determination in these cases by another judge would not in any event be subject to the "law of the case" doctrine or otherwise be binding on this judge. Furthermore she does not claim that the summary decision herein, which was based on undisputed facts, was lacking in substantial evidence. Indeed, the Secretary has never alleged that the facts as presented by CAM are in dispute and there is no record evidence that her failure to file a timely petition was in fact due to the claimed "delivery error" which was the sole reason the Secretary advanced as "adequate cause."

Remand

The summary decision in these cases (based on undisputed facts) was vacated and remanded on the grounds that it was "essential" for the Commission to know why an earlier order by another judge in the case (issued on a misrepresentation of facts in an affidavit submitted by the Secretary) was not followed.[2] Under long-standing and well-established precedent, this Commission has required the Secretary to demonstrate adequate cause for delays in filing penalty petitions. See *Salt Lake County Road Department* 3 FMSHRC 1714, 1716 (July 1981)[3]. In these cases, the Secretary has not only failed to sustain her burden of demonstrating adequate cause for her delay but misrepresented material facts in an affidavit under oath before that prior judge in her apparent attempt to claim that her delay was caused by a "delivery error."

In issuing his previous order, the judge indicated that the affidavit submitted by the Secretary alleged a "delivery error" as her "adequate cause" for late filing. However, since that affidavit has now been shown to have been based on a misrepresentation of facts and that the delay was not in fact based on the claimed "delivery error," that order could not be permitted to stand without remediation[4]. The judge also noted in his order that "given the unprecedented number of penalty petitions pending before the Secretary, strict adherence to the 45 day time line [for filing penalty petitions] is unrealistic." It is noted however that the Secretary never claimed that her delay was due to any number of pending penalty petitions.

Accordingly, since the Secretary submitted to the prior judge an affidavit misrepresenting that the reason for her delay was because of a "delivery error" and failed to provide any other grounds for her delay, she had failed before that prior judge to sustain her burden of proving "adequate cause" for her delay in filing the penalty petitions herein.

---

[2] On November 11, 2011 the Secretary filed a brief in which she argued that the decision on remand should address issues beyond the scope of the Commission's remand order. Since those issues are, indeed, beyond the scope of that remand, they are not addressed herein.

[3] It is noted however that the Commission has recently requested briefing in several cases on the question of whether the *Salt Lake* precedent should be reconsidered.

[4] There is no evidence that the misrepresentation was intentionally false but at the same time no effort has been made to correct the misrepresentation.

Since the prior judge's order allowing late filing could have been premised only on the sole reason provided by the Secretary for "adequate cause" and that reason has been shown by undisputed evidence to have been misrepresented, that prior order could not be permitted to stand without remediation.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
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ADMINISTRATIVE LAW JUDGE ORDERS

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December 12, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-0208
Petitioner	:	A.C. No. 42-02074-168807-01
	:	
	:	Docket No. WEST 2009-0209
	:	A.C. No. 42-02074-168807-02
	:	
	:	Docket No. WEST 2009-0210
	:	A.C. No. 42-02074-168807-03
	:	
v.	:	Docket No. WEST 2009-0342
	:	A.C. No. 42-02074-171897-01
	:	
	:	Docket No. WEST 2009-0591
	:	A.C. No. 42-02074-177140
	:	
	:	Docket No. WEST 2009-0916
	:	A.C. No. 42-02074-185463
	:	
HIDDEN SPLENDOR RESOURCES, INC.,	:	Docket No. WEST 2009-1072
Respondent	:	A.C. No. 42-02074-188416-02
	:	
	:	Docket No. WEST 2009-1162
	:	A.C. No. 42-02074-191367
	:	
	:	Docket No. WEST 2009-1451
	:	A.C. No. 42-02074-197393
	:	
	:	Horizon Mine

ORDER DENYING RESPONDENT'S MOTION TO REOPEN THE RECORD

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Hidden Splendor Resources, Inc. ("Hidden Splendor") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). At a hearing held March 22-25, 2011, the parties presented testimony and exhibits on 11 orders of withdrawal issued under section 104(d)(2) of the Mine Act and 12 citations issued under

section 104(a). Post-hearing briefs were filed on June 2, 2011. Because of the large number of cases pending before me, I have not yet issued a decision on the merits in these cases.

On December 2, 2011, counsel for Hidden Splendor filed an informal motion to reopen these proceedings to present financial information that it considers to be relevant to the "effect on the ability to continue in business" criterion set forth in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). The Secretary opposed the motion.

The parties presented their arguments on this issue during a conference call held on December 9, 2011. Counsel for Hidden Splendor argues that her motion to reopen should be granted based on the three factors set forth in the Commission's decision in *Kerr-McGee Coal Corp.* 15 FMSHRC 352, 357 (March 1993) (citing 6A *Moore's Federal Practice* ¶ 59.04[13] (2d ed. 1992)). In that decision, the Commission held that in determining whether to grant a motion to reopen, "it is appropriate to consider the time when the motion was made, the character of the additional evidence, and the effect of granting the motion." *Id.*

Hidden Splendor states that, in a recent filing with the Securities and Exchange Commission ("SEC"), it was revealed that its financial position has deteriorated since the date of the hearing. It wishes to file this SEC report with this court for me to consider when addressing the effect on the ability to continue in business criterion. It contends that the motion was timely made, after the hearing but before the issuance of the decision. It also argues that the character of the additional evidence is strictly of a financial nature. This evidence will not address any of the substantive issues presented at the hearing but will only concern the appropriateness of any civil penalties assessed by this court. Hidden Splendor relies, in part, on the Commission's decision in *Georges Colliers, Inc*., 23 FMSHRC 822 (Aug. 2001). In that decision, the Commission held that a Commission judge abused his discretion when he declined to consider evidence of the mine operator's financial condition. The Commission held that a judge must consider all of the penalty criteria set forth in section 110(i) of the Mine Act. Finally, Hidden Splendor argues that the effect of granting its request to reopen will not adversely affect the disposition of this proceeding or the safety of miners working at the Horizon Mine. All of the citations and orders were timely abated by Hidden Splendor. It recognizes that granting the motion could possibly delay the issuance of the decision on the merits.

The Secretary opposes the motion. She notes that the hearing was held nine months ago, briefs have been filed, and the citations and orders were issued in 2008. These cases were included in the backlog project and are to be decided as quickly as possible. Granting the motion would significantly delay this proceeding because counsel for the Secretary would need to engage a financial analyst within the Department of Labor to evaluate the financial information provided and then that analysis would need to be reviewed by counsel to determine its relevance on the ability to continue in business criterion. The Secretary also points to the fact that the parties entered into a stipulation at the hearing on the effect on the ability to continue in business criterion. Hidden Splendor stipulated as follows: "If paid in equal monthly installments over 12 months, the proposed penalties would not affect Hidden Splendor's ability to continue in

business." (Stip. ¶ 7). In response, Hidden Splendor argued that its financial condition has changed since March 2011.

For the reasons set forth below, Hidden Splendor's motion to reopen the record is denied. Hidden Splendor is a fully-owned subsidiary of America West Resources, Inc. That company is headquartered in Salt Lake City, Utah, and it is publicly traded on the NASDAQ exchange as AWSR. It is the nature of the mineral extraction industry that profits earned or losses incurred by coal mining companies are often very volatile. A coal mining company can earn record profits one quarter and report a large loss in another quarter. Publicly traded companies are required to file quarterly reports with the SEC on Form 10-Q. This form and other related forms report financial results for the previous quarter and the year to date. Even if this form or another SEC form shows a net loss for the quarter or for the year, that fact does not establish that the penalties in these cases would affect Hidden Splendor's ability to continue in business. Financial statements showing a net loss are not generally sufficient to establish that civil penalties assessed by the Commission will adversely affect an operator's ability to continue in business.[1] *See generally Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994). It is entirely possible that the financial condition of America West Resources will improve in 2012. Thus, I find that the character of the proposed evidence would not advance the disposition of these cases.

I also find that the motion to reopen was not timely filed and granting the motion would adversely affect the timely resolution of these cases. The motion was filed well after the close of the record. Considering the time required for the Secretary to analyze the financial report that Hidden Splendor seeks to submit and the time it will take this court to review the report and the Secretary's response, reopening the record could delay the issuance of the decision. It should be noted that all of the other civil penalty criteria in section 110(i) are applied by Commission judges looking at facts as they existed at the time the citations were issued. Under Hidden Splendor's logic, an operator would be able to reopen the record to provide more up-to-date information on its financial condition as the case works its way through litigation. Hidden Splendor already stipulated that the penalties proposed by the Secretary would not affect its ability to continue in business if it can pay the penalties over a 12-month period. It did not seek to introduce any information regarding its finances at the time of the hearing. The Secretary's total proposed penalty in these cases was $455,902. The parties agreed to settle many citations and orders prior to the hearing for a total penalty of $82,644. I ordered that these penalties be paid pursuant to orders granting partial settlement. The Secretary's total proposed penalty for the 23 citations and orders adjudicated at the hearing is $245,265.[2]

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[1] A net loss recorded by a small, closely-held company or family-owned business may be sufficient under this criterion. America West Resources does not fit into either category.

[2] These figures may not be exact. The Secretary also vacated one of the citations and one of the orders at the hearing and the parties agreed to settle an additional citation. The

(continued...)

The Commission has held that a judge must make findings of fact on each of the statutory criteria to provide the operator with the required notice as to the basis of the penalty assessed and to provide the Commission and the courts with the necessary foundation on which to review whether the penalties assessed by the judge were appropriate. *Kerr-McGee* at 825, *quoting Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (March 1983), *aff'd* 736 F. 2d 1147 (7th Cir. 1984). At the hearing, Hidden Splendor agreed that the Secretary's proposed penalty would not affect its ability to continue in business. Nothing in the record or in the statements of counsel for Hidden Splendor when discussing its motion to reopen suggest that the payment of this penalty or a similar penalty over a 12-month period would seriously risk putting Hidden Splendor or America West Resources out of business. Reopening the record in these cases for the purpose of putting into the record a report filed with the SEC by America West Resources or other financial information would not advance my consideration of the statutory civil penalty criteria in section 110(i) of the Mine Act.

For the reasons set forth above, Hidden Splendor's motion to reopen the record in these cases is **DENIED**.

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

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RWM

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[2](...continued)
penalties for those three items are not included in this total.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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601 NEW JERSEY AVENUE, NW, SUITE 9500
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December 20, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2011-862 A.C. No. 46-08646-241826-01
v.	
ROCK N ROLL COAL COMPANY, INC., Respondent	Mine: Mine No. 3

ORDER REJECTING SETTLEMENT MOTION

Before: Judge McCarthy

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties have settled the matter and the Secretary has filed a motion pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, seeking approval of the proposed settlement. The Solicitor has requested that Citation No. 8093045 be modified to change the classification of the citation from a 104(d)(1) citation to a 104(a) citation and to reduce the level of negligence from "high" to "moderate." The modifications are accompanied with a reduction in the penalty from $13,609.00 to $3,690.00.

The motion submitted by the Solicitor, however, fails to predicate the modifications upon any factual support. Commission Rule 31(b)(1), 29 C.F.R. § 2700.31(b)(1), mandates that for each violation, the "motion to approve a penalty settlement" must include "facts in support of the penalty agreed to by the parties." The Commission has long held that "settlements are committed to the 'sound discretion' of the Commission and its judges" and that judges are not "bound to endorse all proposed settlements." *See*, *e.g.*, *Madison Branch Management*, 17 FMSHRC 859, 864 (June 1995) (*quoting Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (November 1981)). In the exercise of such discretion, judges must be provided with enough facts to make a reasonably informed decision.

In this case, the Settlement Motion fails to provide the required information, inasmuch as no facts have been provided in support of the proposed penalty reduction agreed to by the parties. Therefore, the Motion is **REJECTED**. The Secretary may submit an Amended Motion containing the required information within fifteen days of receipt of this order for my consideration. Otherwise, this case will be set for hearing pursuant to Commission Rule 51, 29 C.F.R. § 2700.51.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
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December 22, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2011-1193
Petitioner	:	A.C. No. 34-02105-262625
	:	
v.	:	
	:	
SPIRO MINING, LLC,	:	
Respondent	:	Mine: Calder Mine

ORDER DENYING RESPONDENT'S MOTIONS TO DISMISS

This case is before me upon the Petition for the Assessment of Civil Penalty ("Petition") filed by the Secretary of Labor on October 20, 2011, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). 30 U.S.C. § 815. The Secretary issued to Respondent Spiro Mining, LLC ("Spiro"), a citation under section 104(a) of the Mine Act, alleging a violation of section 103(a) of the Mine Act at Spiro's Calder Mine. Spiro filed both its Alternative Answer to Secretary of Labor's Petition (Opposing the Assessment of Civil Penalty) and its Motions to Dismiss Action for Failure to State a Claim and for Lack of MSHA Jurisdiction ("Mot. to Dismiss") on November 17, 2011. The Secretary filed her Response to Respondent's Motions to Dismiss on November 21, 2011. Thereafter, Spiro filed a Reply to Secretary's Dismissal Motions Response on November 28, 2011.

In its two-page initial motion and its equally terse reply, Spiro cites to no case law but relies solely on Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure to argue, respectively, that the Secretary lacks subject matter jurisdiction and that she has failed to state a claim upon which relief may be granted. No affidavits or other evidence were submitted in support of Spiro's contentions. In response, the Secretary cites to Commission case law arguing she has jurisdiction in this case and points to Exhibit A attached to her Petition as proof she has set forth a claim.

As a threshold matter, the applicability of the Federal Rules of Civil Procedure to Commission cases is addressed in Commission Procedural Rule 1(b), which states as follows: "On any procedural question not regulated by the Act, these [Commission] Procedural Rules, or the Administrative Procedure Act . . . , the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure." 29 C.F.R. § 2700.1(b). The Commission's Procedural Rules do not provide a procedure analogous to Rule 12, Fed. R. Civ. P. 12; nevertheless, a case before a Commission Judge certainly may be dismissed if the Secretary fails to establish a violation of the Mine Act as

a matter of law. *See* 29 C.F.R. § 2700.67 (setting forth rules for summary decision by a Commission Judge). I address each of Spiro's arguments below.

Fed. R. Civ. P. 12(b)(1) – Lack of Subject Matter Jurisdiction

Spiro argues that the Secretary lacks subject matter jurisdiction over Spiro's operation at the Calder Mine because the mine's "initial 'operations' had not ever yet 'produced products' or 'affected MSHA/interstate commerce.'" (Mot. to Dismiss 1.) The Mine Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter." 30 U.S.C. § 803. In order for the Secretary to establish jurisdiction under the Mine Act, she must prove that a company is an "operator" of a "coal or other mine." 30 U.S.C. § 802(d), (h)(1).

Section 3 of the Mine Act defines "coal or other mine" as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1).

The Commission and reviewing courts have consistently interpreted the Mine Act's jurisdiction in light of its legislative history, which exhorts "that what is considered to be a mine and to be regulated under the Act be given the broadest possible interpretation, and it is the intent of this [Senate] Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 12 (1977). *See, e.g.*, *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1554 (D.C. Cir. 1984) (citing this same legislative history in support of Mine Act's broad jurisdiction); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 797 (4th Cir. 1981) (same); *Calmat Co. of Ariz.*, 27 FMSHRC 617, 622 (Sept. 2005) (same).

In *Cyprus Industrial Minerals Co. v. Federal Mine Safety and Health Review Commission*, the Ninth Circuit considered the operator's argument that its "site was not a mine because the work underway consisted of driving exploratory drifts in search of a commercially exploitable deposit of talc rather than in the extraction of minerals." 664 F.2d 1116, 1117 (9th Cir. 1981). The court noted the Mine Act's expansive jurisdictional language and rejected the operator's argument, reasoning that the "activity at [the site] could hardly be described as anything but mining." *Id.* at 1119.

Similarly, Spiro argues that its preliminary operations at the Calder Mine do not fall under the ambit of the Mine Act. In the face of long-standing legal precedent that would support the Secretary's jurisdiction in this case, Spiro offers no factual allegations or legal authorities in support of its arguments. Accordingly, I reject Spiro's arguments as being without merit.

Fed. R. Civ. P. 12(b)(6) – Failure to State a Claim

Alternatively, Spiro argues this case should be dismissed because the Secretary failed to state a claim upon which relief can be granted. (Reply to Sec'y Resp. to Resp't Mot. to Dismiss 2.) Spiro avers that Exhibit A of the Petition "only sets forth a citation or order that is at issue in this litigation, and not a claim." (*Id.*) The Advisory Committee Notes to the Federal Rules of Civil Procedure state with regard to Rule 12(b)(6) that such a motion may be treated as a motion for summary judgment and disposed of as such. Fed. R. Civ. P. 12 (Advisory Committee Notes, 1946 Amendment, Note to Subdivision (b)). I thus decide Spiro's Rule 12(b)(6) motion in view of Commission Procedural Rule 67, 29 C.F.R. § 2700.67, on motions for summary decision.

Here, the Secretary alleges a violation of section 103(a) of the Mine Act, which directs the Secretary to inspect the Nation's mines and confers her the right of entry to any mine subject to the Act's jurisdiction. 30 U.S.C. § 813(a). It is well-settled that "the Secretary . . . may issue citations for interference with the conduct of an inspection. MSHA's inspection manual directs that in the event an inspector is threatened, harassed, or refused entry into a mine, he should immediately issue a citation alleging a violation of Section 103(a)." Timothy M. Biddle, 1 *Coal Law and Regulation* § 8.04 (1989). Here, the Secretary's citation narrative states verbatim:

> While I was issuing a citation to the Contractor for working men in the face of an order, Jon Marusich, drove up in his pickup and bumped me in the hip with his left front headlight. This was witnessed by two Spiro Mining, LLC employees. Also another MSHA Inspector witnessed this act. This incident happened at the north end of the mining area on the north side of the sediment pond.

(Petition, Ex. A.)

MSHA's Program Policy Manual clearly outlines the seriousness of interfering with an MSHA inspector. Although no criminal violation is before me, section I.103-1 of MSHA's manual, titled "Assaulting, Intimidating or Impeding Inspectors," notes in relevant part, the potential criminal penalties for interfering with an MSHA inspector:

> Section 111 of Title 18 of the United States Code makes it a federal crime to forcibly assault, resist, oppose, impede, intimidate or interfere with any person designated in Section 1114 of Title 18 while such person is engaged in, or on account of, the performance of his/her official duties. It is a crime to assault, intimidate or impede MSHA employees who are assigned to perform investigative, inspection, or law enforcement functions. Thus, any person who assaults, intimidates or impedes an MSHA inspector, while the inspector is

> engaged in, or on account of, the performance of his/her official duties, is subject to investigation and arrest by the FBI, prosecution by the U.S. Attorney in the federal courts, and to a fine and/or imprisonment.

I MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Section 103-1 (Feb. 2003), at 6. Indeed, both the Commission and its Judges have recognized that the Secretary's right of entry includes the right to be free from mine operator interference that would frustrate her legitimate objectives. *Calvin Black Enters.*, 7 FMSHRC 1151 (August 1985) (finding management's requirement of mine owner's written permission for inspectors to enter mine site violated § 103(a) by effectively preventing inspectors access to mine); *United States Steel Corp.*, 6 FMSHRC 1423 (June 1984) (affirming citation for violation of § 103(a) when operator refused to provide transportation to inspector which effectively prevented him from inspecting accident scene); *Knock's Building Supplies*, 20 FMSHRC 535, 548-49 (May 1998) (ALJ) (upholding violation of section 103(a) after threatening an inspector with a shotgun).

Based on the current record before me, I determine that the Secretary has alleged interference with her duty to inspect the Nation's mines, which, if proven, would constitute a violation of section 103(a) of the Mine Act. Spiro does not contradict the allegations stated in the citation, nor does Spiro cite to any case law to support a contention that it is entitled to summary decision as a matter of law. Indeed, Spiro offers nothing but the bald allegation that the Secretary has failed to state a claim. As the Secretary has indeed stated an alleged violation of the Mine Act, I reject Spiro's argument to the contrary as being without merit.[1]

---

[1] In her response to Spiro's motion, the Secretary notes that Spiro filed similar motions in three dockets before Judge Andrews, which were denied on July 29, 2011. Judge Andrews subsequently denied Spiro's Motion for Certification of 7/29/2011 Interlocutory Ruling on August 18, 2011. Following these orders, the Commission denied Spiro's Petition for Interlocutory Review on October 12, 2011, as well as Spiro's Petition for Reconsideration on November 8, 2011. By signing a document filed with the Commission Spiro's counsel certifies:

> [t]hat he has read the document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

29 C.F.R. § 2700.6(b). The Commission's Rules provide for disciplinary proceedings for any failure to comply with its rules. *Id.* § 2700.80(b).

Based on the forgoing, Spiro's Motions to Dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) and for failure to state a claim upon which relief can be granted under Rule 12(b)(6) are hereby **DENIED**.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 29, 2011

PATTISON SAND COMPANY, LLC, Contestant	:	CONTEST PROCEEDING
	:	Docket No. CENT 2012-65-RM
	:	Citation No. 8660155; 10/20/2011
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Mine ID: 13-02297
	:	Pattison Sand Company Mine

ORDER DENYING CONTESTANT'S MOTION TO DISMISS AND MOTION FOR SUMMARY DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, ("the Act"). Pattison Sand Company, LLC ("Pattison") is contesting Citation No. 8660155 issued by an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) for a violation of the standard at 30 C.F.R. § 57.3200. That standard provides as follows:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

The citation was issued on October 20, 2011 and the case was thereafter scheduled for expedited hearings to commence on November 8, 2011. The citation was terminated however on October 25, 2011 after the alleged violative conditions were abated. Since expedited hearings were no longer necessary, the hearings were cancelled.

Contestant thereafter filed the motion to dismiss and motion for summary decision now before me. Under Commission Rule 67(b) "[a] motion for summary decision shall be granted only if the entire record including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law."

In connection with its motion for summary decision Contestant set forth the following alleged undisputed facts:

1. On October 20, 2011, Inspector Anthony D. Runyon, a designated representative of MSHA, issued the Citation to Pattison Sand for an alleged violation at the Pattison Sand Company Mine. Exhibit A (omitted).

2. The Citation was issued under Section 104(a) of the Mine Act. It alleges moderate negligence, an S&S violation of 30 C.F.R. § 57.3200, a reasonable likelihood of injury or illness, and a reasonable expectation of lost of workdays or restricted duty. *Id*

3. The Citation alleges:

> Ground conditions that create a hazard to miner were not taken down or supported before work and travel active was allowed to presume between isle 4AI and 4AF. Multiple cracks and loose material is visible in this area. The south side of 4AF shows visible signs of separation and loose material. The crack then travels from 4AF to 4AG north side showing in some area approximately 4 inch deep cracks into the back continuing on to south side of 4AG to a brow where multiple cracks exist ranging from 4 to 12 inch into the back and approximately 6 inch wide, the crack continues to the south side of 4AH with a single crack to north side of 3AI where multiple crack exit from the single crack to the south side of 3AI. The total length of the crack is approximately 242 feet long.
>
> Spalling or commonly known as pinch out as also occurred on the north half of pillar 4AI where the rib and back meet for approximately 25 feet. The pinch out measured approximately 6 feet down from the back and 3 feet into the pillar giving it a V shape at the top of the pillar.
>
> This area was mechanical scale 7 days ago and has been hand scaled since then giving an impression that not only scaling will be enough to control this material from cracking an falling.
>
> A daily inspection from a high lift has not been conducted as required by ground control plan.
>
> This mine has strong history of back and rib falls causing injuries to miners.
>
> *Id*

4. The Citation set the termination due date as October 28, 2011. *Id*

5. In reference to the termination due date, Inspector Runyon wrote the following on the Citation:

The termination due date has been extended to allow the Mine Operator time to correct the cited condition **on the basis that only miners correcting the condition are allowed in the cited area.**

6. Inspector Runyon modified the Citation on October 20, 2011 correcting typographical errors and deleting entirely the allegations in the second and third paragraphs of the Citation narrative. *Id.*

7. Inspector Runyon terminated the Citation on October 20, 2011. *Id*

While these facts (except for the date the citation was terminated) indeed appear to be undisputed, Contestant, in its arguments, then intermingles other alleged material facts which are clearly in dispute, including its assertion that the subject citation was actually a withdrawal order closing down the entire mine. The Secretary has submitted an affidavit and documentation to dispute the latter allegations. Underlying both motions is Contestant's argument that the provisions of the citation limiting access to the cited hazardous area to "only miners correcting the condition" closed the entire mine and, as such, is not permitted under section 104(a) of the Act.

Since both motions are premised on the same disputed factual allegations both motions must be denied and the disputed issues reserved for full evidentiary hearings.

Order

Contestant's motion to dismiss and motion for summary decision are denied.

/s/ Gary Melick
Gary Melick
Administrative Law Judge
202-434-9977

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